No. ——— (1)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Supreme Court, U.S.
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CABLE NEWS NETWORK, INC.; TURNER BROADCASTING SYSTEM, INC.; ROBERT RAINEY; DONALD HOOPER; and JACK HAMANN,

Petitioners,

v.

PAUL W. BERGER, ERMA R. BERGER; UNITED STATES OF AMERICA; RODNEY C. HANLON; JOEL SCRAFFORD; RICHARD C. BRANZELL; ROBERT PRIEKSAT; and KRIS A. MCLEAN;

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do members of the news media engage in "joint action" with the government, sufficient to subject them to liability for constitutional violations as if they were government actors, when for independent newsgathering purposes they arrange to observe and are present when government law enforcement agents execute a search warrant?

2. Do law enforcement agents violate the Fourth Amendment when they permit the news media to observe, for independent newsgathering purposes, the execution of an otherwise proper search warrant?

RULE 29.6 LISTING

Time Warner, Inc. is the parent company of Petitioner Turner Broadcasting System, Inc. ("TBS") which, in turn, is the parent company of Petitioner Cable News Network, Inc. ("CNN"). Neither TBS nor CNN has any nonwholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Cable News Network, Inc., Turner Broadcasting System, Inc., Robert Rainey, Donald Hooper, and Jack Hamann (collectively, "CNN") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in these related cases.

OPINIONS BELOW

The opinion of the court of appeals is reported at 129 F.3d 505. App. 1a-26a. The decisions of the district court are unreported. *Id.* at 27a-48a, 49a-60a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on November 13, 1997. CNN's timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on February 25, 1998. This Petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves portions of the First and Fourth Amendments to the Constitution of the United States, which provide as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

U.S. CONST. amend. I.

> The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

U.S. CONST. amend IV.

STATEMENT OF THE CASE

This case concerns a common newsgathering practice known as a "ride along," in which a journalist accompanies law enforcement agents and observes them at work.[1] Here, the Ninth Circuit held that a twenty-four-hour news network's request for a ride along, a federal agency's granting of that request, and the ride along itself—in

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[1] *See, e.g., Parker v. Clarke*, 905 F. Supp. 638, 644 (E.D. Mo. 1995), *aff'd in part and rev'd in part sub nom. Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997); *see also Wilson v. Layne*, —— F.3d ——, Nos. 96-1185, 96-1188, 1998 WL 159673 (4th Cir. Apr. 8, 1998) (en banc).

which the network's reporters observed and recorded news footage as the agency executed a criminal search warrant —amounted to "joint action" between the news network and the agency, subjecting the private newsgatherers to liability for an alleged Fourth Amendment violation as if they were government actors.

For two independent reasons, the Ninth Circuit's far-reaching holding merits review by this Court. First, the holding conflicts with opinions from other courts of appeals and raises an important question of federal law as to whether journalists may be treated as arms of the government when, for independent newsgathering purposes, they arrange for access to government activities. More broadly, the case conflicts with this Court's holdings regarding the state action doctrine and the contours of that doctrine as applied to private parties who act autonomously and out of private choice, but whose conduct intersects with government activities. Second, the holding presents an important question of federal constitutional law that has not been, but should be, settled by this Court: whether an otherwise reasonable search becomes unreasonable, and thereby violates the Fourth Amendment, when members of the news media witness it.

A. Factual Background

Petitioners herein are Cable News Network, Inc., a twenty-four-hour television news network; its parent company, Turner Broadcasting System, Inc. ("TBS"); Jack Hamann, a news reporter for CNN; and Robert Rainey and Donald Hooper, CNN employees who served as Hamann's camera crew.[2]

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[2] Respondents Paul and Erma Berger, plaintiffs below, brought two separate actions arising from the events described here. One named Cable News Network, Inc. and Hamann as defendants; the other named TBS, Rainey, and Hooper, as well as certain federal government actors (the United States of America, an Assistant U.S. Attorney, and four U.S. Fish and Wildlife Service agents) as defendants. The actions proceeded on identical courses in the district court and were treated as consolidated on appeal. App. 7a,

Reporter Hamann is a Seattle-based correspondent for CNN who regularly reports on environmental matters and other news from the western United States. ER *Hamann* 5/2; *Hanlon* 8/2.[3] In 1993, while working for the CNN Environment Unit, he heard reports that western ranchers were poisoning endangered species in violation of federal law, often with impunity since local officials and juries were sympathetic toward the ranchers' efforts to protect livestock from predators. ER *Hamann* 5/2; *Hanlon* 8/2. Hamann decided to investigate what, if anything, federal authorities were doing to stop the illegal wildlife killings. In the course of his newsgathering investigation, he learned that the United States Fish and Wildlife Service ("FWS") would be conducting a raid of the property of a rancher suspected of poisoning wildlife. In fact, the FWS was investigating a report that rancher Paul Berger was killing eagles unlawfully on his 75,000-acre property near Billings, Montana.

In March 1993, a federal magistrate issued FWS agents a search warrant and two seizure warrants, authorizing them to search the Berger ranch for evidence that wildlife were being killed in violation of federal law. ER *Hamann* 5/3-4; *Hanlon* 8/3-4. The FWS agents executed the warrants on March 24, 1993 and seized evidence. Berger was charged with violating federal laws that prohibit killing eagles. A jury convicted him of applying a pesticide to sheep carcasses with the intent to kill predators, including eagles, in violation of 7 U.S.C. § 136j(a)(2)(G). He was acquitted of three other charges. *United States v. Berger*, CR 93-46-BLG-JDS (D. Mont. Oct. 20, 1993). App. 7a.

49a n.1. This Petition is brought solely by CNN. CNN has been informed that the individual government agents are filing a separate petition for certiorari.

[3] The excerpts of record ("ER") refer to the two volumes the Bergers filed in each of the two actions ("*Hamann*" or "*Hanlon*", respectively). The references are to the tab number within the ER and the exhibit within the tab.

Prior to the execution of the warrants, but at least two months after the FWS had initiated its investigation of Berger, the FWS gave CNN permission to accompany its agents during the execution of a search. App. 4a. This permission was confirmed in a letter stating that the government "agrees to allow CNN to accompany USFWS Agents as they execute a criminal search warrant near Jordan, Montana, some time during the week of March 22, 1993." The letter further stated that CNN retained "complete editorial control" over any footage it recorded of the search, but that CNN would not show any footage until such time as doing so posed no risk to any defendant's fair trial rights.[4]

As part of its newsgathering efforts, CNN attended a briefing for FWS agents the day before the warrants were executed. Hamann asked a few questions regarding the nature of the poisons allegedly used by Berger and local ranchers' views about federal authorities, ER *Hamann* 5/8; *Hanlon* 8/8/Tape 5/pages 4, 6, but the record contains no evidence that CNN played any role in the briefing, assisted in planning or executing the search, or coordinated in any way with the government beyond what was necessary to arrange to obseve and record the search for newsgathering purposes.

On the day of the search, the large group of government agents executing the warrants drove to the ranch, followed in a separate, private vehicle by Hamann, Rainey and Hooper. ER *Hamann* 5/8; *Hanlon* 8/8/Tape 6/page 3-Tape 7/page 2. One of the government vehicles had a small, fixed CNN camera mounted on its hood facing into the vehicle, and FWS agent Joel Scrafford wore a microphone that transmitted sound to the CNN crew. App. 6a; ER *Hamann* 5/8; *Hanlon* 8/8/Tape 7-Tape 20/page 1. While the FWS agents executed the warrant, the journalists videotaped portions of the agents' authorized search of the ranch, its outbuildings and surrounding public

[4] This was the complete substance of the letter, which is set out in its entirety in the Ninth Circuit opinion. App. 4a-5a.

roads. App. 6a. CNN never entered the Bergers' home, though Agent Scrafford did, with Berger's consent. *Id.* Berger's voluntary conversations with the FWS agent both inside and outside the house were recorded through the microphone Scrafford was wearing. *Id.*

After Berger's conviction, CNN used portions of its footage of the search on the environmental news programs "Earth Matters" and "Network Earth" as part of its news coverage of government efforts to protect endangered species. The programs were shown in October 1993 and several times in 1994. App. 2a; ER *Hamann* 5/9; *Hanlon* 8/9. CNN retained sole control over the footage, which never has been used in any fashion besides the newscasts, nor been provided to the government.

B. Proceedings Below

After Berger's criminal conviction, he and his wife brought these civil actions against CNN and the government. The Bergers sued under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), claiming (1) that the federal agents violated Plaintiffs' Fourth Amendment rights by permitting the news media to attend and record the search, and (2) that by observing the search CNN acted under color of federal law and thus was accountable for the Fourth Amendment violation as if it too were a government actor. App. 3a.[5] Jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1367(a).

The district court granted summary judgment for all Defendants. The court correctly noted that to establish *Bivens* liability, Plaintiffs had to prove Defendants (1) acted under color of federal law and (2) deprived them of a constitutionally protected right. App. 41a n.3, 54a

[5] The Bergers brought other federal and state law claims, and sought an injunction restraining CNN's future broadcasts of its news footage. App. 3a. None of these claims is at issue in this Petition.

n.3. The court held that the Bergers' claim against CNN failed to establish the first element:

> the media defendants were not acting under color of law when they filmed the execution of the search. When a private party, such as [CNN], is present during a search as a means of furthering its own interests, it is not acting under color of law and is not liable under *Bivens*.

Id. at 41a; *accord* 54a. As to whether the FWS deprived the Bergers of a constitutionally protected right, the court found that it was not clearly established that the Fourth Amendment is violated when law enforcement agents allow news crews to accompany them during the execution of a valid search warrant, and therefore that the government defendants were entitled to qualified immunity. *Id.* at 36a-37a, 45a n.5. The court distinguished cases in which a private party *assisted* in executing a warrant or *participated with* government agents in the search for evidence, noting that "CNN was simply observing the agents who were serving the warrant." *Id.* at 36a.

The Ninth Circuit reversed. On the *Bivens* question, the court began with the premise that because of the arrangements CNN made with the FWS to facilitate its newsgathering efforts,

> [t]his was no ordinary search. It was jointly planned by law enforcement officials and the media, as memorialized by a written contract, so that the officials could assist in the media obtaining material for their commercial programming.

Id. at 9a-10a.

The Ninth Circuit found that CNN acted under color of law, despite its private status, because it was a "willful participant in joint action with the [government] or its agents," and thus could be held liable under *Bivens*. *Id.* at 18a. Without discussing CNN's independent newsgathering purpose for observing the search, the panel found "[FWS] agents planned and executed the search in a manner designed to enhance its entertainment, rather than its

law enforcement value . . . and to portray themselves as tough, yet caring investigators . . . ." The court found that CNN and the government obtained a "mutual benefit" or engaged in a conspiracy sufficient to hold CNN liable under this Court's "state action" cases, including *Dennis v. Sparks*, 449 U.S. 24 (1980), *Adickes v. S.H. Kress and Co.*, 398 U.S. 144 (1970), and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). The Ninth Circuit based this "joint action" finding solely on the letter confirming CNN had permission to observe the FWS activities, and CNN's presence at the FWS briefing and search. App. 19a.

The Ninth Circuit also reversed the district court's finding of qualified immunity for the FWS agents. The court held that the agents violated the Fourth Amendment by allowing CNN to "invade" the Bergers' property and by conducting a search "intended to serve a major purpose other than law enforcement"—namely, obtaining "publicity" for the government, and "material for . . . commercial programming" and "entertainment" for CNN. *Id.* at 2a, 10a.

REASONS THE WRIT SHOULD BE GRANTED

This Petition should be granted because the Ninth Circuit's opinion conflicts with decisions of this Court and other courts of appeals, and raises important and unsettled questions of federal law regarding the reach of the "state action" doctrine and the nature of the Fourth Amendment.

I. CNN, A PRIVATE NEWSGATHERER, DID NOT BECOME A "STATE ACTOR" BY WITNESSING THE ACTIONS OF LAW ENFORCEMENT AGENTS OR BY RECEIVING CONFIDENTIAL GOVERNMENT INFORMATION.

The Ninth Circuit erroneously concluded that members of the news media engage in "joint action" with the government, sufficient to subject them to liability for constitutional violations as if they were government actors,

when for independent newsgathering purposes they arrange to observe and are present when government law enforcement agents execute a search warrant.

First, the opinion ignores the principle, established by this Court, that when a private party acts out of uncoerced, independent initiative to achieve private—not governmental—goals, the party cannot be deemed a "joint actor" with the government. The Ninth Circuit opinion also directly conflicts with a recent ride along case from the Eighth Circuit, which along with other courts of appeals recognizes that private conduct is not subject to constitutional liability merely because it intersects with government actions. *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997).

Second, the Ninth Circuit based its holding that CNN was "jointly engaged" with the FWS entirely on circumstances that other courts of appeals have held to be legally insufficient to impose constitutional liability on private actors: the existence of a contract between the government and the private party and the government's provision of information to the private party.

Third, the Ninth Circuit decision conflicts with opinions of this Court holding that institutionally and professionally autonomous private parties, properly exercising their professional functions, cannot be treated as government actors for purposes of constitutional liability. Labeling as "state actors" members of the news media who are engaged in private newsgathering activity imposes constitutional liability on private actors whose interests do not coincide with, and institutionally are antagonistic to, those of the government.

Fourth, the Ninth Circuit opinion threatens to erode news media access to, and therefore public understanding of, government law enforcement activities in a manner inimical to the First Amendment.

A. The Ninth Circuit Opinion Ignores the Principle, Established by This Court and Other Circuits, That a Private Party Is Not a Government Actor When Its Conduct Is an Exercise of Independent Choice Motivated by Private, Not Governmental, Ends.

The Ninth Circuit reached the extraordinary conclusion that a private news network is subject to *Bivens* liability [6] and is treated as an arm of the government even when the network acted independently and on its own initiative to arrange to observe first-hand the government's response to an important environmental and law enforcement problem. Equally remarkable, the Ninth Circuit so held despite acknowledging that CNN accompanied the FWS *not* to search the Berger ranch, but for private reasons distinct from any governmental interest. *See* App. 2a ("the media wanted footage . . . and the government wanted the publicity"); *id.* at 23a (noting, in reversing district court's dismissal of state trespass claim, that "the officers invited the media for *newsgathering*, not for law enforcement") (emphasis added). Because the parties literally acted concurrently in arranging for CNN to observe the FWS search, CNN was found to be a "joint actor" with the FWS—even though its conduct was a matter of private choice, its purpose was independent of the government's, and its actions were free from government coercion or influence at all times.

This holding is inconsistent with this Court's decisions analyzing when private parties act under color of law by virtue of "joint action" with the government. Of course, the starting point of this analysis is that, generally, consti-

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[6] To establish a *Bivens* claim, the plaintiff must prove the defendant acted under color of federal law. This is akin to the "under color of state law" showing required under 42 U.S.C. § 1983. *Butz v. Economou*, 438 U.S. 478, 500-01 (1978). Both standards generally are treated as the equivalent of the "state action" showing required to assert other constitutional violations. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924, 928-29 (1982); *United States v. Price*, 383 U.S. 787, 794 n.7 (1966).

tutional strictures apply only to government actors, not private entities. This principle is necessary to protect private autonomy:

> Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power . . . . A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.

Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-37 (1982).[7]

This principle requires courts to act prudentially and with restraint before attributing constitutional deprivations to non-governmental conduct—particularly to "private conduct that itself is the subject of constitutional protection." *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1271 (10th Cir. 1989). Applied here, the state action requirement should mean that the activities of private, independent journalists are not subject to constitutional liability, unless those activities clearly reflect governmental, not journalistic, choices. By imposing *constitutional*—as opposed to merely statutory or common law[8]—liability on CNN, the Ninth Circuit opinion infringes on the presumptive freedom journalists have to choose privately how to gather news.

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[7] In the words of one commentator, since

> human values are many, conflicting, and irreconcilable, private persons and institutions should be presumptively free to act in accordance with manifold and differing values. . . . The [state action] doctrine frees private persons to act in accordance with many and competing values, unless legislation—popularly enacted and popularly revocable—intervenes to require private compliance with constitutional values.

Maimon Schwarzschild, *Value Pluralism and the Constitution: In Defense of the State Action Doctrine*, 1988 Sup. Ct. Rev. 129, 137.

[8] The Bergers also alleged causes of action under Montana trespass and emotional distress law, which remain pending.

To find an exception to the rule that a private party is not liable for deprivations of constitutional rights, the private party's conduct must "be fairly attributable" to the government. *Lugar*, 457 U.S. at 937. This requires that the private actor "must be a person who may fairly be said to be a state actor." *Id.*

A review of this Court's case law demonstrates the consistent principle that private parties may not "fairly be said to be" government actors when their conduct is a matter of autonomous, private choice and initiative. Converting private conduct to "government action" requires that the government either has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the [private] choice must be deemed to be that of the state." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). "The conduct of a private entity is not subject to constitutional scrutiny if the challenged action results from the exercise of private choice and not from state influence or coercion." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 411-12 (1995) (O'Connor, J., dissenting).[9]

This dichotomy—between private autonomy and initiative on the one hand and affirmative governmental influence or coercion on the other—is critical to determining whether a private party can be treated as a state actor. In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987), for

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[9] Though Justice O'Connor's discussion in *Lebron* of the role of private choice in the state action determination arose in a dissenting opinion, the majority did not dispute her analysis, which synthesizes and restates this Court's state action cases. Rather, the majority found it unnecessary to decide whether the actions of a private entity could be regarded as state action, holding the entity in question—Amtrak—was not private for constitutional purposes. Justice O'Connor dissented because she found the argument that Amtrak was a public entity was outside the question presented for review, and therefore found it necessary to address the "state action" question.

example, the Court held that the United States Olympic Committee ("USOC"), chartered by Congress as a private corporation, was a private actor and thus could not be liable for allegedly violating a nonprofit corporation's equal protection rights when it enjoined an unauthorized use of the term "Olympic." In reaching this conclusion, the Court relied "[m]ost fundamentally" on the principle that private conduct is not state action absent some governmental compulsion or significant encouragement:

> The USOC's choice of how to enforce its exclusive rights to use the word "Olympic" simply is not a government decision. There is no evidence that the Federal Government coerced or encouraged the USOC in the exercise of its right.

Id. at 547. Mere approval of or acquiescence by the government to a private act is insufficient to label the private conduct "state action." *Id. See also National Collegiate Athletic Ass'n v. Tarkanian,* 488 U.S. 179, 196 n.16 (1988) (private athletic association's recommendation that state university discipline coach not state action because public and private interests "do not coincide").

The Ninth Circuit failed to recognize the principle that a private actor whose conduct is a matter of private choice and initiative is not a government actor just because the conduct in some ways intersects with government activities. Here, the Ninth Circuit opinion conflicts directly with a 1996 decision from the Eighth Circuit holding that a television news crew did not act under color of law when it went with police into a home and recorded the execution of a search warrant. *Parker v. Boyer,* 93 F.3d 445 (8th Cir. 1996), *cert. denied,* 117 S. Ct. 1081 (1997). The television station had arranged to ride along with police and, like CNN here, "was there for reasons of its own and was engaged in a mission entirely distinct from the one that brought the police to the house." *Id.* at 448. Because the news crew's acts "[a]t most . . . were committed parallel to and contemporaneous with"

the police officers' execution of the warrant, the station's actions could not be attributed to the government. *Id.*

Other ride along cases from the Eighth and Tenth Circuits similarly hold, in conflict with the Ninth Circuit opinion, that private citizens who observe and accompany police for independent purposes unrelated to law enforcement do not act under color of law. *Price v. Baker,* 693 F.2d 952 (10th Cir. 1982) (private citizen riding with spouse, a rural police officer, to keep him company, did not act under color of law when she hit suspect on her own accord); *Russ v. Ratliff,* 538 F.2d 799, 800, 805 (8th Cir. 1976) (police trainee riding with officer to learn police procedures not state actor when he was present and observed officer shoot arrestee); *see also Jones v. Taibbi,* 508 F. Supp. 1069, 1073 (D. Mass. 1981) (reporter's agreement to not publicize information about suspect in return for access to arrest scene not joint action; "[a]lthough both [police and reporter] had an interest in the suspect, their respective motives were disparate. [They] had a coincidence of interest in the plaintiff as a suspect, but not the concert of involvement that would transform [the broadcast] from a private venture" into state action); *Freedman v. Coppola,* 614 N.Y.S.2d 833 (N.Y. App. Div. 1994) (television reporter who covered claimant's arrest as part of news report not state actor absent showing that reporter "orchestrated the police investigation or played any part in deciding whether or how to arrest the plaintiff").

More generally, private parties do not act under color of law merely because their conduct occurs in proximity to government actors. Far greater interaction is required: It is necessary "that both public and private actors share a common, unconstitutional goal." *Cunningham v. Southlake Ctr. for Mental Health, Inc.,* 924 F.2d 106, 107 (7th Cir. 1991); *accord Collyer v. Darling,* 98 F.3d 211, 232 (6th Cir. 1996) (absent "shared goal" with state, private doctor hired by state to independently examine state employee not state actor), *cert. denied,* 117 S. Ct. 2439 (1997); *Price,* 693 F.2d 952 (private actor not subject

to civil rights liability where she acted not under police direction but independently and of own volition).

The Ninth Circuit failed to acknowledge the requirement—let alone to require—that the private and public parties share an unconstitutional goal. It does, however, suggest that *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), supports the Ninth Circuit's "joint action" finding, based on broad language in *Burton* that private parties act under color of law when they have a "symbiotic relationship" with the government. App. 17a, 19a-20a. *Burton*, however, does not apply in the present circumstances.

Burton held that where a public authority built and owned a public parking garage and leased space inside the garage to a restaurant, the "addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred," and the public space involved sufficed to make the restaurant a state actor such that it could not refuse to serve customers based on race. 365 U.S. at 724. Under those circumstances, "[t]he State [had] so far insinuated itself into a position of interdependence" with the restaurant that the state action finding was justified. *Id.* at 725. The Ninth Circuit extends this notion of "interdependence" and mutual benefit far beyond its origin in a public/private financial relationship by applying it to CNN's arrangements to spend a day observing, for newsgathering purposes, the FWS at work. App. 17a-19a.[10]

The Ninth Circuit's application of the "joint action" test in this manner proves Justice O'Connor's admonition that, "[g]iven the pervasive role of Government in our society, a test of state action predicated upon public and private 'interdependence' sweeps much too broadly and would subject to constitutional challenge the most pedestrian of everyday activities . . . ." *Lebron*, 513 U.S. at 411

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[10] Additionally, *Burton*'s holding expressly was limited to lessees of public property. 365 U.S. at 726. This Court reiterated the narrow applicability of *Burton* in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358 (1974).

(O'Connor, J., dissenting). The Ninth Circuit opinion subjects ride alongs—a routine journalistic technique typical of media efforts to gain access to the actions of government—to constitutional liability. "A more refined inquiry" —one fully consistent with this Court's decisions—is that "[t]he conduct of a private entity is not subject to constitutional scrutiny if the challenged action results from the exercise of private choice and not from state influence or coercion." *Id.* at 411-12 (O'Connor, J., dissenting).

Here, CNN's actions resulted from the exercise of private choice, not from governmental influence or coercion. Its purpose was to gather news, not to play any part in the government's law enforcement actions; it acted on its own behalf, not under color of law.[11] Thus, CNN should not be subject to *Bivens* liability, *regardless* of whether the government deprived the Bergers of a right protected by the Fourth Amendment.[12]

In sum, the Court should grant this Petition because the Ninth Circuit opinion, in finding joint action here, conflicts with the core rationale of this Court's state action decisions—providing breathing room for the free exercise of private, autonomous activity by shielding it from constitutional liability. *Lugar*, 457 U.S. at 936.

B. This Court and Other Courts of Appeals Consistently Have Required Far Greater Interaction Before Private Parties and Government Agents Can Be Considered "Joint Actors."

In holding CNN to be a government actor, the Ninth Circuit concluded that CNN's conduct "satisfies the joint

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[11] To the extent the Ninth Circuit opinion suggests CNN's conduct is less worthy of protection because its news programming is "commercial," the opinion fails to recognize the well-established principle that profit does not "strip communications of otherwise available constitutional protections." *Harte-Hankes Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989); *accord City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1998).

[12] Although, as set forth *infra* in Section II, the Ninth Circuit's holding that the underlying government conduct in this case was unconstitutional also should be reversed.

action test," because it was "jointly engaged with [government] officials in the challenged action" or was a "willful participant in joint action" with the government. App. 19a. This articulation of the joint action test relies on broad language from cases which demonstrate that labeling private parties "joint actors" requires a far greater level of interaction and shared purpose than is present in this case. Specifically, the evidence cited by the Ninth Circuit as supporting the joint action finding—the "agreement" between the FWS and CNN and the government's provision of certain information to CNN—has been held by other courts of appeals to be legally insufficient to transform private conduct into state action.

The cases relied on by the Ninth Circuit arose in contexts that, when compared with the instant case, make clear that the Ninth Circuit applied the joint action test far too sweepingly. The statement that a private party acts under color of law when it is "jointly engaged with state officials in the prohibited action" or "a willful participant in joint activity with the State" originated in *United States v. Price*, 383 U.S. 787, 794 (1966), a case in which three civil rights workers were released from police custody, then recaptured and murdered by a group of police officers and private citizens. The criminal indictment alleged that the defendants intended to "punish" the victms in an explicit conspiracy to violate the victims' due process rights —a "brutal joint adventure [that] was made possible by state detention and calculated release of the prisoners by an officer of the State." *Id.* at 795. The private defendants in *Price*, unlike those in the instant case, both shared the government actors' unconstitutional purpose and acted in a manner significantly encouraged by the government actors.

A second case cited by the Ninth Circuit, App. 18a, *Dennis v. Sparks*, 449 U.S. 24, 27 (1980), involved allegations that "an official act of the defendant judge was the product of a corrupt conspiracy" in which private individuals bribed the judge to violate plaintiff's due process rights. Similarly, the private party in *Adickes v.*

S.H. Kress & Co., 398 U.S. 144, 152 (1970), was alleged to be "a willful participant" with local police in "an understanding to deny [plaintiff] service in [defendant's] store, or to cause her subsequent arrest because she was a white person in the company of Negroes."

In the instant case, no such "corrupt conspiracy" existed, and it is not even alleged—nor could it be—that CNN was a "willful participant" to an understanding aimed at violating the Bergers' Fourth Amendment rights. Rather, the FWS and CNN each engaged in separate and legitimate activities—the FWS gathered evidence of a crime, not news; CNN engaged in newsgathering, not law enforcement. *See Jones*, 508 F. Supp. at 1073 (no state action in ride along where "[t]he LAPD did not play any role in determining what [the reporter] would film or later telecast [and reporter] had no part in the determination as to whether or when [plaintiff] would be arrested").[13] Nonetheless, the Ninth Circuit deemed CNN a "joint actor" because of a letter "agreement" between CNN and the government[14] and because of CNN's attendance at a government briefing at which "it is also alleged that federal entities shared confidential information with the media." App. 19a. As numerous courts have recog-

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[13] *See also Donohoe v. Watt*, 546 F. Supp. 753, 757 (D.D.C. 1982) ("Even if the stimulus to act originates with the government, a private individual's independent conduct based on information supplied by a government official cannot be characterized as state-action."), *aff'd*, 713 F.2d 864 (D.C. Cir. 1983).

[14] The Ninth Circuit characterizes this letter as "a written contractual commitment between the government and the media to engage jointly in . . . the execution of a search warrant." App. 19a. This characterization is contradicted by the letter itself, which plainly states that the government agreed simply "to allow CNN to accompany USFWS Agents as they"—*the agents*—"attempt to execute a criminal search warrant . . . ." App. 5a. The letter further makes clear on its face that CNN was "engaged" solely in a private, independent newsgathering endeavor over which it retained sole editorial control. But, as discussed below, even if the letter were construed as a "contract," it still cannot support the Ninth Circuit's joint action finding.

nized, this is insufficient to support holding a private entity to be a joint government actor.

First, an agreement or contract between a private party and government actors does not transform the private actor's conduct into state action. *See Collyer,* 98 F.3d 211 (private psychiatrist hired to examine government employees not, by virture of contract, a state actor); *Gallagher v. Neil Young Freedom Concert,* 49 F.3d 1442 (10th Cir. 1995) (private firm that allegedly searched plaintiff unreasonably not state actor despite contract with public university to provide concert security); *Simescu v. Emmet County Dept. of Soc. Servs.,* 942 F.2d 372, 375 (6th Cir. 1991) ("The mere existence of a contract between a government agency and a private party is insufficient to create state action."); *Cunningham,* 924 F.2d 106 (employer under contract to provide counselor to county jail not a joint state actor when it fired counselor after jail accused him of stealing inmate food); *Jones,* 508 F. Supp. at 1072-73 (no state action where "[t]he only concerted action between the [media] defendants and the state was [the reporter's] agreement not to disclose what he knew about [plaintiff] until, if ever, [plaintiff] was arrested by the LAPD" in return for permission to film arrest).

Second, private parties do not become "joint actors" or act under color of law simply because they obtain confidential information from the government. Indeed, such a rule as applied to journalists would be antithetical to the historic and constitutionally protected role of the news media: Since the founding of this country, it has been well understood that the very purpose of a free press is to "bare the secrets of government and inform the people." *New York Times Co. v. United States,* 403 U.S. 713, 717 (1971) (Black, J., concurring); *see also* Potter Stewart, "*Or of the Press,*" 26 Hastings L.J. 631, 636 (1975) ("So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can."). Other courts have recognized that journalists cannot be held liable as state actors where "[t]he facts

alleged merely demonstrate defendants were acting as any news reporting organization typically does." *Brooks v. American Broad. Co.*, 737 F. Supp. 431, 440 (N.D. Ohio 1990) ("News reporters often have access to official reports and documents to aid them in investigating and preparing a story, but that alone does not convert these acts into state action."), *aff'd in part & vacated in part on other grounds*, 932 F.2d 495 (6th Cir. 1991). Otherwise, the news media "would be significantly discouraged from interviewing state officials to gather information on important public issues." *Phelps*, 886 F.2d at 1271; *accord Buford v. Tremayne*, 747 F.2d 445, 447 (8th Cir. 1984) (journalists not joint actors by virtue of "conspiring" with government when they act solely in professional capacity as reporters in obtaining information from public officials).

Conversely, it is well recognized that the joint action test is not satisfied when private actors, by virtue of their professions, share information with the government. For example, when such professionals in the course of doing their jobs report crimes to the authorities, they are not thereby held to be conspirators or "joint actors" with the government. *See Collyer*, 98 F.3d at 232; *Pino v. Higgs*, 75 F.3d 1461 (10th Cir. 1996) (therapist who reported patient's mental instability to police did not do so under color of law); *Lowe v. Aldridge*, 958 F.2d 1565 (11th Cir. 1992) (therapist reporting child clients' allegations of sexual abuse to police did not act under color of law).

The Ninth Circuit opinion stands as an invitation to other lower courts to overreach, in a manner that will sweep in—as "willful participation" or "joint engagement" —many other types of private conduct that intersect with government activities, but are not dictated or controlled by government actors. Under the Ninth Circuit's theory, reporters who, for example, attend a state official's press conference or obtain special access to interview a public official, could be held liable as joint actors should a court later determine that the government officials somehow behaved unconstitutionally at these events.

In sum, the Court should grant this Petition for the independent purpose of clarifying that members of the

news media permitted to observe government activity or provided information by the government do not as a result thereof become joint actors with the government. *See* Stewart, *supra,* 26 Hastings L.J. at 634 ("The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution *outside the Government* as an additional check on the three official branches.") (emphasis added).

C. The Ninth Circuit Decision Conflicts With the Decisions of This and Other Courts Recognizing That Institutionally Autonomous Entities, Such as the News Media, Are Not Government Actors.

The Petition also should be granted because the Ninth Circuit opinion conflicts with decisions of this Court holding that when a private party institutionally is autonomous from the government, its professional activities cannot be deemed government action. *Polk County v. Dodson,* 454 U.S. 312 (1981). *Polk* held that public defenders do not act under color of law, in part because of the "constitutional obligation of the State to respect the professional independence of the public defenders whom it engages." *Id.* at 321-22. The Court recognized that it is incongruous to label as a state actor a private party who, under our system of government, "characteristically opposes" the state. *Id.* at 318.

Like the public defenders in *Polk,* CNN belongs to a profession whose independence the government is obligated, under our constitutional structure, to respect. In an analogous context, this Court has held that a television network is not a state actor and thus may reject advertisements without incurring constitutional liability. *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.,* 412 U.S. 94 (1973). 'To hold that broadcaster action is government action would thus produce a result wholly inimical to the broadcasters' own First Amendment rights . . . ." *Id.* at 140 (Stewart, J., concurring).

Many lower court decisions similarly recognize the damage to our constitutional structure that would result were members of the news media held liable for deprivations

of constitutional rights as if they were government actors. Such characterizations are contrary to this country's traditional conception of an independent press as watchdog of the government:

> Rather than regarded as an extension of the state exercising delegated powers of a governmental nature, the press has long and consistently been recognized as an independent check on government power. . . . [T]he function of the press from the days the Constitution was written to the present time has never been conceived as anything but a private enterprise, free and independent of government control and supervision. *Rather than state power and participation pervading the operation of the press, the news media and the government have had a history of disassociation.*

Chicago Joint Bd., Amalgamated Clothing Workers v. Chicago Tribune Co., 435 F.2d 470, 474 (7th Cir. 1970) (emphasis added); *accord Mims v. Philadelphia Newspapers, Inc.*, 352 F. Supp. 862, 865 (E.D. Pa. 1972) (in rejecting argument that newspaper given access to prison was state actor, court held: "They are newspaper people whose orbit is far from the governmental sphere and, by virtue of the first amendment, essentially insulated from it."). "[T]he historic function of newspapers, like the pamphlets of a prior day, has been to oppose government, to be its critic not its accomplice." *Resident Participation of Denver, Inc. v. Love*, 322 F. Supp. 1100, 1105 (D. Colo. 1971). This refusal to subject the news media to constitutional liability extends even to publications of state institutions, such as public university or high school newspapers: Where student editors, not school officials, exercise independent editorial discretion, the publication is not a state actor. *Yeo v. Lexington*, 131 F.3d 241, 254-55 (1st Cir. 1997) (en banc) (student editors were not state actors, given they were independent from and "[a]t times, close to adversarial" to school officials (citing *Polk*)),

petition for cert. filed, 66 U.S.L.W. 3604 (Mar. 9, 1998) (No. 97-1462).[15]

By treating journalists as an arm of the government when they are doing their jobs, the Ninth Circuit opinion conflicts with the historic and constitutional understanding of the news media as watchdog and, frequently, adversary of government. Subjecting the news media to constitutional liability in this manner encroaches on the news media's recognized right to operate free from government interference.[16] Therefore, adherence to the state action doctrine as a limit on "the reach of federal law and federal judicial power," *Lugar*, 457 U.S. at 936-37, particularly is appropriate here.

D. Subjecting Journalists to Constitutional Liability for Newsgathering Will Result in Less Public Scrutiny of Government Functions, and Thus Raises Important First Amendment Issues.

The Petition also should be granted to address the serious implications the Ninth Circuit opinion has for newsgathering. "The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). More precisely, "reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial importance to citizens concerned with the administration of government." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring).[17]

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[15] *Accord Leeds v. Meltz*, 85 F.3d 51 (2d Cir. 1996); *Sinn v. The Daily Nebraskan*, 829 F.2d 662 (8th Cir. 1987); *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976).

[16] *Cf. Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) ("Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.").

[17] *See also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 604 (1980) (Blackmun, J., concurring) (public has "right to know about the administration of justice in general; about the prosecution of local crimes in particular; about the conduct of . . . police officers [and], other public servants . . . .").

The Ninth Circuit opinion threatens the ability of the press to fulfill this constitutionally recognized role of providing information about the conduct of law enforcement and other matters of public concern. CNN sought to prepare a news report about the government's efforts to enforce laws protecting wildlife, and used footage of the FWS search in its reporting on the issue. Yet the Ninth Circuit held that CNN now is subject to liability for a constitutional violation precisely for making arrangements necessary for it to perform its newsgathering function. If journalists face liability as joint government actors for arranging for access to law enforcement activities, and if by permitting such access police violate the Fourth Amendment, it is inevitable that media access to many vital law enforcement activities will cease. The result—a public less informed about the significant activities of its government —is inimical to the First Amendment.

Because even the possibility of liability in this area is likely to severely discourage news coverage of law enforcement, the Court should grant this Petition to resolve the uncertainty journalists and government agents now face in this area. The Ninth Circuit opinion leaves unclear when journalists who arrange for access to government activities sufficiently are "jointly engaged" with the government to be deemed to act under color of law. Reporters who view crime scenes with police permission, obtain access to government buildings, or attend press conferences called by public officials inherently engage in some degree of planning and joint participation; the Ninth Circuit opinion leaves uncertain when making such arrangements becomes "joint action."[18]

Resolving this uncertainty requires nothing more than adhering to this Court's admonition in *Lugar* against extending civil rights liability to private actors who are not

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[18] Adding to this climate of confusion is the conflict among the circuits over whether law enforcement agents violate a clearly established Fourth Amendment right by permitting the news media to observe and record the execution of a warrant. *See infra* Section II.

fairly characterized as government officials. Given the news media's watchdog role and history of disassociation from government, journalists who simply are gathering news cannot "fairly be said to be" government actors. *See Yeo*, 131 F.3d at 254-55 ("the analysis of whether there is state action must proceed with care" when First Amendment implicated); *Phelps*, 886 F.2d at 1271 (cautioning against imposing constitutional liability on "private conduct that itself is the subject of constitutional protection"); *Zerilli v. Evening News Ass'n*, 628 F.2d 217 (D.C. Cir. 1980) (affirming dismissal of Fourth Amendment-based *Bivens* action against private newspaper in part because imposing liability on press for gathering news would undermine "the values served by a free and vigilant press").

This Petition should be granted to allow the Court to preserve the important First Amendment interests raised by this case, by making clear CNN cannot fairly be described here as a joint actor with the United States government.

II. THE COURT SHOULD RESOLVE THE IMPORTANT BUT UNSETTLED QUESTION OF WHETHER GOVERNMENT LAW ENFORCEMENT AGENTS VIOLATE THE FOURTH AMENDMENT BY PERMITTING JOURNALISTS TO OBSERVE AND RECORD THE EXECUTION OF A WARRANT.

Independently, the Court should grant this Petition because the Ninth Circuit ruled on an important question of federal law that has not been, but should be, settled by this Court: whether an otherwise reasonable search or seizure becomes unreasonable, and thereby violates the Fourth Amendment, because of law enforcement agents' not uncommon practice of permitting members of the news media to be present as observers. Four courts of appeals now have weighed in—either directly on the Fourth Amendment issue or on the corresponding issue of qualified immunity—sending very conflicting signals in this regard. Guidance from the Court is necessary now to end this great uncertainty in Fourth Amendment jurisprudence so that private newsgatherers fulfilling their First Amendment-

based role, public law enforcement agents, and the lower federal courts may govern themselves accordingly.

The Ninth Circuit, following *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995), held that law enforcement agents violate the Fourth Amendment when they allow journalists, for newsgathering purposes, to observe and record the execution of a warrant. In contrast, the Fourth and Eighth Circuits have held, for purposes of qualified immunity, that government agents violate no clearly established Fourth Amendment right when they permit such media access. *Wilson v. Layne*, —— F.3d ——, Nos. 96-1185, 96-1188, 1998 WL 159673 (4th Cir. Apr. 8, 1998) (en banc); *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997).

In *Parker*, the court noted that "most courts" that had considered the question prior to *Ayeni* found no constitutional prohibition on permitting journalists to observe the execution of a warrant. 93 F.3d at 447 (citing *Avenson v. Zegart*, 577 F. Supp. 958 (D. Minn. 1984); *Moncrief v. Hanton*, 10 Media L. Rep. 1620 (N.D. Cal. 1984); *Higbee v. Times-Advocate*, 5 Media L. Rep. 2372 (S.D. Cal. 1980); and *Prahl v. Brosamle*, 295 N.W.2d 768 (Wisc. Ct. App. 1980)).

The Fourth Circuit, following *Parker*, recently held in a 6-5 en banc opinion that police who allowed reporters to witness the execution of a warrant inside a home violated no clearly established Fourth Amendment right. *Wilson*, 1998 WL 159673. In that case, two journalists from *The Washington Post* arranged a two-week ride along with the United States Marshals Service, during which the journalists photographed federal marshals and local police as they executed an arrest warrant inside a residence. The court of appeals held the officers were entitled to qualified immunity. The court emphasized that the officers did not exceed the scope of the warrant by allowing journalists to observe their activities, because "the reporters did not conduct a search of, or intrude into, any areas of the Wilsons' home into which the officers would not have been

permitted to go in executing the warrant." *Id.* at *3. Furthermore, the court held that the officers' decision to permit media access "served a legitimate law enforcement purpose":

> It is in fact a legitimate function of law enforcement to facilitate accurate reporting on law enforcement activities and to improve public oversight of those activities by use of the press. These efforts are important because both the deterrence of crime and the deterrence of improper conduct by law-enforcement officers are vital to the broader mission.

Id. at *5. *Wilson* thus stands in direct conflict with the Ninth Circuit opinion, which utterly failed to recognize the legitimacy of the FWS's interest in permitting public oversight of its activities through the news media.

The Ninth Circuit opinion in the instant case purports to distinguish *Parker* and *Wilson* on the grounds that the law enforcement officers in those cases did not engage in the "planning, cooperation and assistance to the media" that the FWS provided CNN. App. 12a. However, as a matter of common sense, the distinction the Ninth Circuit sought to draw between *Parker* and *Wilson* on the one hand and the facts in this case on the other does not exist: In each case—as inherently is true—the news media were able to record and witness the searches *only* after arranging to accompany the law enforcement agents in the first place and after obtaining, expressly or implicitly, the agents' approval to enter the premises being searched. *Wilson*, 1998 WL 159673, at *1 (plaintiffs claimed police violated their Fourth Amendment rights "by permitting two newspaper reporters to accompany them into [the plaintiffs'] home. . . . [T]wo newspaper reporters . . . were to accompany the officer to observe and chronicle the execution of the warrant."); *Parker*, 93 F.3d at 446 ("The police told the reporter that a weapons investigation was in progress that he might be interested in covering . . . . Sgt. Simon Risk later informed Officer Rodney Boyer that KSOK personnel would accompany him on his shift . . .

and KSOK personnel rode to the scene in a police car with Officer Boyer. . . . [The police] entered through an unlocked front door, and the KSOK personnel followed the police into the house.").

In any event, the Ninth Circuit fails to explain why providing "assistance to the media"—in the form of facilitating journalists' requests to be present when an otherwise permissible search is being conducted—makes that search unreasonable under the Fourth Amendment: If police do not act unreasonably merely by *permitting* journalists to observe a search, it is difficult to see—and the Ninth Circuit did not explain—why *planning to permit* such media access would violate the Fourth Amendment.

Neither the Ninth Circuit here nor the Second Circuit in *Ayeni* provides meaningful guidelines for future behavior. The Sixth Circuit has criticized *Ayeni* for "failing to define narrowly the right allegedly violated," noting that the Second Circuit's reliance on an overly broad conception of the Fourth Amendment as a guarantor of privacy makes it "difficult to see how a police officer could tailor his conduct under such a vague standard." *Bills v. Aseltine*, 52 F.3d 596, 602 (6th Cir.), *cert. denied*, 516 U.S. 865 (1995). The same is true of the Ninth Circuit opinion, which leaves both police and journalists unsure when a government agency's facilitation of a ride along becomes "planning, cooperation and assistance," App. 12a, sufficient to violate the Fourth Amendment.

Given the division among the courts of appeals and the importance of this issue for both the news media and law enforcement agents, this Court should address the question of whether the Fourth Amendment is violated when law enforcement agents allow reporters to observe the execution of warrants.

CONCLUSION

Journalists pursuing news for independent, professional purposes do not act under color of law, even when their newsgathering activities inherently involve making arrange-

ments with government officials. By failing to recognize this, the Ninth Circuit opinion conflicts with the state action doctrine as interpreted by this Court and other courts of appeals. For this reason, and the other grounds set forth above, CNN respectfully requests that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 96-35251

D.C. No. CV-95-00046-JDS

PAUL W. BERGER and ERMA R. BERGER,
Plaintiffs-Appellants,

v.

RODNEY C. HANLON; JOEL SCRAFFORD; RICHARD C. BRANZELL; ROBERT PRIEKSAT; KRIS A. MCLEAN; TURNER BROADCASTING SYSTEM, INC., a Georgia corporation; ROBERT RAINEY; DONALD HOOPER; UNITED STATES OF AMERICA,
Defendants-Appellees.

No. 96-35266

D.C. No. CV-94-00046-JDS

PAUL W. BERGER and ERMA R. BERGER,
Plaintiffs-Appellants,

v.

JACK HAMANN; CABLE NEWS NETWORK, INC., a Georgia corporation,
Defendants-Appellees.

Appeals from the United States District Court
for the District of Montana
Jack D. Shanstrom, District Judge, Presiding

Argued and Submitted
September 19, 1996—Seattle, Washington

Filed November 13, 1997

Before: Mary M. Schroeder and Andrew J. Kleinfeld, Circuit Judges, and Rudi M. Brewster,* District Judge.
Opinion by Judge Schroeder

OPINION

SCHROEDER, Circuit Judge:

When federal agents searched the ranch of Paul and Erma Berger in March of 1993, they acted not only pursuant to a search warrant, but also pursuant to a written contract with appellees Cable News Network and Turner Broadcasting System, authorizing the filming and recording of the search for broadcast on their environmental television shows "Earth Matters" and "Network Earth." The media wanted footage of the discovery of evidence showing that Paul Berger was poisoning eagles, and the government wanted the publicity.

After Mr. Berger was convicted of one misdemeanor count for using a pesticide in a manner inconsistent with its labeling, 7 U.S.C. § 136j(a)(2)(G), and acquitted of

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* Honorable Rudi M. Brewster, United States District Judge for the Southern District of California, sitting by designation.

three felony counts of the killing of at least one eagle, the Bergers sued both the media and the federal agents under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), for the violation of their constitutional rights. The Bergers also sued the media for the violation of the Federal Wiretap Act, 18 U.S.C. §§ 2511, *et seq.*, for various state law torts, and to enjoin further broadcasts of the video shot at their ranch. The Bergers' principal contentions under federal law are that (1) the federal agents violated their Fourth Amendment rights by permitting commercial television cameras to film the search and by assisting the media in their search for dramatic material, and (2) the media acted sufficiently in concert with the federal agents to be held accountable for that violation as government actors.

On the *Bivens* action the district court ruled that the federal agents were entitled to qualified immunity because there was, at the time of this episode, no clearly established law protecting individuals from the commercial recording of a search of their residences. The court also held that the Bergers were collaterally estopped from litigating the reasonableness of the search because the same issues had been decided adversely to Mr. Berger in his criminal trial. In addition, the court rejected the Bergers' claim that the media had become government actors for purposes of *Bivens* liability.

We reverse the judgment in favor of the federal appellees on the Fourth Amendment claim because we hold the federal officers are not entitled to qualified immunity in this case. Because we hold that the issues litigated in the criminal proceeding were not the same as the issues presented to the district court in this civil suit, we also reverse the district court's ruling that this action is barred. The judgment in favor of the media on the *Bivens* claim is reversed because, on the basis of the present record, we must consider the media to have acted jointly with the federal appellees, and hence "under color of law." We

affirm the district court's ruling that the media are not liable under the Federal Wiretap Act, however.

On the state law claims, we reverse the court's ruling in favor of the media on the trespass and infliction of emotional distress causes of action. We affirm the ruling on the conversion claim, and decline to enjoin further broadcasts.

In reviewing the grant of summary judgment to the appellees, we view the evidence in the light most favorable to the Bergers. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996).

FACTS AND PROCEDURAL BACKGROUND

Paul and Erma Berger reside on a 75,000 acre ranch in Montana. At the time of the search, Mr. Berger was 71 and Mrs. Berger was 81. In January of 1993, former employees of the Bergers apparently went to the United States Fish and Wildlife Service ("USFWS") and told USFWS agents that they had seen Mr. Berger poison or shoot eagles a few years earlier. Upon hearing about the investigation, the media appellees, Cable News Network, Inc. and CNN employee Jack Hamann, together with Turner Broadcasting System, Inc. and TBS employees Robert Rainey and Donald Hooper, approached agents of USFWS to see if a television deal could be worked out . The media wanted footage for their environmental programs and the government wanted to publicize its efforts to combat environmental crime. On March 11, 1993, approximately two weeks before the search was executed, the Assistant U.S. Attorney in charge of Mr. Berger's investigation, federal-appellee Kris McLean, and media correspondent Jack Hamann, executed the following letter agreement on CNN letterhead:

> Dear Mr. McLean:
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> This confirms our agreement that the United States Attorney's Office for the District of Montana agrees

to allow CNN to accompany USFWS Agents as they attempt to execute a criminal search warrant near Jordan, Montana, some time during the week of March 22, 1993. Except as provided below, CNN shall have complete editorial control over any footage it shoots; it shall not be obliged to use the footage; and does not waive any rights or privileges it may have with respect to the footage.

In return, CNN agrees to embargo the telecast of any videotape of the attempt to execute the search warrant until either: (1) a jury has been empaneled and instructed by a judge not to view television reports about the case; or (2) the defendant waives his right to a jury trial and agrees to have his case tried before a judge; or (3) a judge accepts a plea bargain; or (4) the government decides not to bring charges relating to the attempt to execute the search warrant. Please acknowledge your agreement to the foregoing by executing the signature line below.

Sincerely, Jack Hamann, Correspondent, CNN Environment Unit.

Acknowledged signature of Kris McLean, Assistant United States Attorney for the District of Montana, Helena, Montana.

cc: Jennifer Falk Weiss, CNN Legal Department. Chet Burgess, CNN Environment Unit.

On March 18, a magistrate judge issued a search warrant for the Bergers' ranch, authorizing the search of the ranch and appurtenant structures, excluding the residence, for evidence indicating the taking of wildlife. According to the Bergers, the magistrate judge had no knowledge of the planned media participation during the search, and there is no contention by the appellees that when the magistrate judge issued the warrant, he approved the videotaping of the search for broadcast purposes.

According to the Bergers, the media participated in a pre-search briefing the day before the search, at which the federal appellees shared with the media details of the material included in the warrant and supporting materials that were supposed to remain under seal until after the search.

On the morning of the search, the government team, accompanied by a media crew, gathered on a county road leading to the ranch, to discuss the execution of the warrant. The cameras videotaped that gathering. The broadcast team then proceeded with the federal agents and AUSA McLean in a caravan of approximately ten vehicles to a point near the Bergers' ranch. Media cameras mounted on the outside of government vehicles, or placed in their interior, documented every move made by the federal appellees. At all times during and immediately prior to the search, USFWS Special Agent Joel Scrafford was wired with a hidden CNN microphone which was continuously transmitting live audio to the CNN technical crew.

Mr. Berger approached and met the caravan in a pickup truck on the road leading up to the ranch. Agent Scrafford proceeded to inform Mr. Berger of the search warrant, and asked him whether he could ride to the house in Mr. Berger's truck so that he could explain to Mrs. Berger what they were going to do. Mr. Berger allowed Agent Scrafford to ride with him in the pickup truck. Upon arriving at the Bergers' residence, the two men entered the house together. Audio recorded at the site indicates that Mr. Berger consented to Agent Scrafford's entry into the home at this time. The parties disagree on whether the agents who entered the residence with Agent Scrafford searched the residence for incriminating evidence, and whether Agent Scrafford's subsequent entries into the home were consented to. However, it is undisputed that Agent Scrafford recorded all his conversations with the Bergers inside the house.

The Bergers were not informed that Agent Scrafford was wearing a microphone or that the cameras that were visible during the search belonged to the media. The media recorded more than eight hours of tape and it broadcast both the video footage and the sound recordings made in the house.

Mr. Berger was tried on an amended information charging him with the taking of at least one golden eagle, in violation of 16 U.S.C. § 668(a); the killing of one ferruginous hawk, and one ring-billed gull, in violation of 16 U.S.C. §§ 703 and 707(a); the taking of at least one bald eagle in violation of 16 U.S.C. § 1538(a)(1)(B) and 16 U.S.C. § 1540(b)(1); and the use of a registered pesticide, Furadan, in a manner inconsistent with its labeling. The charge was that Mr. Berger applied Furadan to sheep carcasses with the intent of killing predators, including eagles, in violation of 7 U.S.C. §§ 136j(a)(2)(G).

Before trial, the magistrate judge denied a defense motion to suppress evidence on the grounds that the agents lacked probable cause to search and that the warrant did not accurately describe the property to be searched. Mr. Berger was acquitted of all charges, except the misdemeanor charge of using Furadan contrary to its labeling.

The Bergers filed two actions in 1995, which proceeded on identical courses. The district court entered a final judgment in favor of all the appellees in both cases in February 1996, and these parallel timely appeals followed.

COLLATERAL ESTOPPEL

The district court ruled that because issues concerning the constitutionality of the search have already been litigated in Mr. Berger's criminal case, this action was barred by collateral estoppel. The court relied on *Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 762 (9th Cir. 1991), which holds that a plaintiff is estopped from bringing a civil action to challenge an issue which was " 'distinctly put in issue and directly determined' in a previous criminal

action", and *Matthews v. Macanas*, 990 F.2d 467, 468 (9th Cir. 1993), which affirmed the dismissal of a *Bivens* action based on the preclusive effect of a Fourth Amendment ruling in a previous criminal action.

The difficulty with the district court's reasoning is that a party is generally estopped or precluded from litigating only those issues that have previously been decided. *See Allen v. City of Los Angeles*, 92 F.3d 842, 849 (9th Cir. 1996); Restatement (Second) of Judgments § 27. Collateral estoppel can thus be used in a civil action to bar relitigation of issues decided in a prior criminal proceeding, but, as *Bagley* recognized, a party may only be estopped from bringing a civil action to challenge a particular issue if that issue was " 'distinctly put in issue and directly determined' in a previous criminal action." *Bagley*, 923 F.2d at 762 (quotation omitted).

Because the magistrate judge in the criminal case was not presented with the specific issues raised in this action, the district court erred in holding that the Bergers' *Bivens* action was barred. In the *Bivens* claim, the Bergers are concerned with whether the search was unreasonable because of the media's involvement in the search.

In his motion to suppress in the criminal case, on the other hand, Mr. Berger challenged the validity of the warrant itself. He contended that (1) it failed to establish probable cause because it contained no facts indicating either the veracity of the informants, or independent law enforcement investigation to corroborate the information given by the informants; (2) the search warrant was stale; and (3) the property designated in the search warrant was improperly described.

The magistrate judge's rulings directly responded to these, and only these arguments. He agreed with the government that (1) the veracity of the informants could be presumed and that no corroboration was required; (2) the facts set forth in the affidavit indicated that Mr. Berger

was engaged in an ongoing pattern of criminal activity, so the evidence was not stale, and (3) although the description of the real estate in the warrant was "grossly excessive and inaccurate," the defect did not rise to such a level as to "offend[] the Constitution."

This case is thus fundamentally different from *Matthews*, on which the district court relied. In *Matthews*, the plaintiff incorporated by reference in his *Bivens* brief the same Fourth Amendment arguments he had presented in his criminal appeal, i.e., that the affidavit submitted in support of the search warrant would not have established probable cause had the affiant not misled the issuing court. Because a panel of this court had already held in Matthews' criminal appeal that the affidavit did establish probable cause, the panel reviewing Matthews' *Bivens* action correctly deemed the civil action barred by collateral estoppel. *Matthews*, 990 F.2d at 468. By contrast, the arguments and issues raised in the motion to suppress in this case were not the same as the arguments and issues raised in the Bergers' *Bivens* action, and therefore, collateral estoppel does not bar this civil suit.

THE BIVENS CLAIM

1. *The violation of the Fourth Amendment and immunity*

The Bergers claim that the federal appellees, AUSA Kris McLean and USFWS Special Agents Rodney C. Hanlon, Joel Scrafford, Richard C. Branzell and Robert Prieksat, are individually liable for damages caused by their active participation in the commercial television/law enforcement enterprise conducted at the Bergers' ranch. The Bergers contend that the resulting search violated their Fourth Amendment rights against unreasonable searches and seizures. We hold they are correct and that the federal officers are not entitled to qualified immunity.

This was no ordinary search. It was jointly planned by law enforcement officials and the media, as memorialized by

a written contract, so that the officials could assist in the media obtaining material for their commercial programming. The television cameras invaded the residential property of the plaintiffs and the microphone invaded their home. This search stands out as one that at all times was intended to serve a major purpose other than law enforcement. Yet, the federal agents obtained the warrant without disclosing the contract, the planned press presence, or the media's purpose. The Fourth Amendment to our Constitution protects against unreasonable searches and warrants that are obtained under false pretenses:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. We must heed its strictures on the potential abuse of law enforcement powers. This search violated its protections.

Regardless of whether a constitutional violation has occurred, the federal appellees are, of course, entitled to qualified immunity if they could reasonably have believed that their conduct violated no clearly established federal statutory or constitutional rights. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982); *Shoshone-Bannock Tribes v. Fish & Game Comm'n*, 42 F.3d 1278, 1285 (9th Cir. 1994). The federal appellees contend that even if the search was unconstitutional, they could have reasonably believed their conduct was lawful.

The Second Circuit has held that qualified immunity does not protect federal officers in a case where a Secret Service agent invited a TV news magazine into a private home to videotape a search. *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994). *Ayeni* affirmed District Judge Wein-

stein's decision in *Ayeni v. CBS*, 848 F. Supp. 362 (E.D.N.Y. 1994). The Second Circuit held that even though there was then no reported decision expressly forbidding agents from inviting the press into the home of the person searched, no reasonable officer could have thought it permissible. This was in part because of a federal statute prohibiting any persons, other than law enforcement personnel and those assisting them from executing search warrants, 18 U.S.C. § 3105. It was in major part because the publicity purpose would "magnify needlessly the impairment of their right of privacy." *Id.* at 686.

Similarly, the Fourth Circuit has held that where the federal officer brings along an employee of a private corporation acting for the corporation's purposes, not in aid of the officer, the federal officer's conduct violates the Fourth Amendment and he is not entitled to qualified immunity. *Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir. 1995). Though noting *Ayeni* with approval, the Fourth Circuit said "[w]e would so hold even if there were no reported authority directly on point," *id.* at 356, because the historical foundations of the Fourth Amendment and the statute discussed above so plainly showed that "[t]he right to be free from government officials facilitating a private person's general search" was " 'manifestly included' within the 'core' Fourth Amendment protection." *Id.* at 357. *See also Anderson v. WROC-TV*, 441 N.Y.S.2d 220, 226 (1981) (stating in a case in which the media was sued for trespass, that "[i]f the media were to succeed in compelling an uninvited and non-permitted entry into one's private home whenever it chose to do so this would be nothing less than a general warrant equivalent to the writs of assistance which were so odious to the American colonists").

We find even further support for this view when we observe that no circuit decision has ever upheld the constitutionality of a warranted search where broadcast media were present to document the incident for non-law enforce-

ment purposes, and where the videotaping and sound recording were outside the scope of the warrant. The cases on which the federal agents rely do not hold such searches are constitutional. In *Stack v. Killian*, 96 F.3d 159 (6th Cir. 1996), the Sixth Circuit held that police were justified in permitting a television crew to be present when the warrant itself expessly authorized photography and videotaping. In *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997), a majority held officers had immunity in permitting a television crew to be inside a house during a search, but one member of the panel, Judge Rosenbaum, wrote separately to state that in his view the Fourth Amendment had been violated. Another, Judge Richard Arnold, wrote that in his view the media defendants were joint actors with the police in allegedly violating constitutional rights. *See id.* at 448-49. In *Wilson v. Layne*, 110 F.3d 1071 (4th Cir. 1997), *vacated* July 30, 1997, a majority of the panel held that the police had qualified immunity when they permitted newspaper reporters and photographers to accompany them while searching a house, but specifically refused to decide the issue of the reasonableness of the search. The dissenting member of the *Wilson* panel, Judge Russell, would have denied immunity and held the conduct patently unreasonable. The entire court has now reheard the case en banc.

In none of these cases did law enforcement officials engage in conduct approaching the planning, cooperation and assistance to the media that occurred in this case. The defendants rely upon a trio of older, lower court decisions that upheld the constitutionality of searches or arrests where the police invited the media to ride along and record or photograph the law enforcement activity. *Moncrief v. Hanton*, 10 Media L. Rep. (BNA) 1620, 1621-22 (N.D. Ohio Jan. 6, 1984); *Higbee v. Times-Advocate*, 5 Media L. Rep. (BNA) 2372, 2372-73 (S.D. Cal. Jan. 9, 1980); *Prahl v. Brosamle*, 295 N.W.2d 768, 774 (Wis. Ct.App. 1980). In those cases, however, the media repre-

sentatives were viewed as playing a passive role, as observers, rather than as active participants in planned activity that transformed the execution of a search warrant into television entertainment, as happened here. Indeed we have already recognized the difference between videotaping searches for law enforcement purposes and for entertainment. *Marks v. Clarke*, 102 F.3d 1012 (9th Cir. 1996) (as amended on denial of rehearing Feb. 26, 1997, petition for cert. filed May 27, 1997). We there noted that our court and others have assumed without deciding that videotaping for law enforcement purposes does not render a search unreasonable, *see id.* at 1032 n.37, but recognized that a different result might be required if the recording were for other purposes. We cited the Second Circuit's decision in *Ayeni*, that squarely held a residential search videotaped by commercial television cameras was unreasonable, and the officers unprotected by qualified immunity. We reach the same legal conclusions in this case.

2. *The Open Fields Doctrine*

The appellees also claim that they could have violated no privacy interest in videotaping the shed and other outbuildings on the ranch, because their cameras shot footage only from the open fields or of structures in which the Bergers had no expectation of privacy. *See Katz v. United States*, 389 U.S. 347, 360-61, 88 S. Ct. 507, 516-17 (1967) (the Fourth Amendment is not triggered unless the government intrudes into an area in which there is a constitutionally protected reasonable expectation of privacy).

Because the Fourth Amendment speaks only to "persons, houses, papers, and effects," an individual cannot claim a constitutional violation on account of law enforcement officers' warrantless searches of their "open fields." *Hester v. United States*, 265 U.S. 57, 59, 44 S. Ct. 445, 446 (1924) (Holmes, J.); *and see United States v. Dunn*,

480 U.S. 294, 107 S. Ct. 1134 (1987); *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735 (1984); *United States v. Van Damme*, 48 F.3d 461, 464-65 (9th Cir. 1995).

This argument misses the mark in this case. The open fields doctrine is not a license for the police to bring trespassers on to private property. It allows law enforcement officers to obtain evidence while on privately owned open fields. It would thus entitle the officers to prevail if the Bergers were suing them for a warrantless search of open fields for evidence of criminal activity. It does not immunize the officers from liability for conduct that has no law enforcement purpose.

Moreover, there is evidence in the record that the shed and other outbuildings that were a focus of the cameras were places in which the Bergers did have a reasonable expectation of privacy, in that they were located close to the house and guarded by a dog. The officers would not have reasonably believed the search of the outbuilding involved open fields for which no warrant was required, much less that the open fields doctrine authorized third parties to trespass.

3. *The Invited Informer Doctrine*

Throughout the execution of the search warrant, Agent Scrafford wore a microphone that transmitted live to the media the conversations between him and the Bergers in their house. The media appellees recognize that the home was outside the scope of the search warrant and that the Bergers did not consent to the microphone's entry into the home. They claim, however, that their surreptitious recording of the Bergers' conversations did not violate the Bergers' Fourth Amendment rights because the Bergers consented to Scrafford's presence and to his being a party to the conversations.

The appellees rely on the "invited informer" or "misplaced confidence" doctrine to support their claim. *See,*

e.g., United States v. White, 401 U.S. 745, 91 S. Ct. 1122 (1971); *Hoffa v. United States*, 385 U.S. 293, 87 S. Ct. 408 (1966); *Lewis v. United States*, 385 U.S. 206, 87 S. Ct. 424 (1966); *Forster v. County of Santa Barbara*, 896 F.2d 1146, 1147-48 (9th Cir. 1990). The invited informer doctrine was developed in cases where the government placed informers, often with recording devices, to obtain information for legitimate law enforcement purposes. *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989). In *Aguilar*, we held that the invited informer doctrine justifies the use of undercover agents and informers, as long as their use is part of a good faith government investigation. *See also Reporters Committee v. American Telephone & Telegraph*, 593 F.2d 1030, 1043 (D.C. Cir. 1978) ("once [people] project[] [their] activities beyond [their] private enclave, the Government is free to scrutinize them for law enforcement purpose"). The invited informer doctrine is thus rooted in the principle that privacy interests must give way to legitimate government scrutiny when a communication is voluntarily made to a third party. Our court in *Aguilar* made this rationale clear when it explained that:

> In approving this investigative technique, the Supreme Court unmistakably declared that persons have no expectation of privacy or confidentiality in their conversations and relations with other persons, no matter how secretive the setting. The Court has recognized that legitimate law enforcement interests require persons to take the risk that those with whom they associate may be government agents.

Aguilar, 883 F.2d at 703.

The invited informer doctrine does not apply in this case, because the surreptitious recording was not done for a legitimate law enforcement purpose. The recording in this case materially differs from the invited informer cases where the informer was assisting law enforcement. Here,

law enforcement authority was used to assist commercial television, not to further law enforcement objectives.

The appellees further contend that the Bergers' conversations must have been "voluntary" because the magistrate judge in the criminal proceeding refused to suppress Mr. Berger's statements for lack of the *Miranda* warnings. Their contention is without merit. The only finding the magistrate judge made was that Mr. Berger had not been placed under the functional equivalent of a formal arrest when he made the statements, so his *Miranda* rights did not attach. *See Berkemer v. McCarthy*, 468 U.S. 420, 440-42, 104 S. Ct. 3138, 3150-52 (1984). He did not rule that Mr. Berger's statements were "voluntary."

The invited informer doctrine thus does not shield the media from liability. We recognized this more than twenty years ago when we held that eavesdropping by the media for public broadcast, even in conjunction with law enforcement, violates important privacy interests. *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971). *Dietemann* involved the exposing of a quack doctor by media reporters who were cooperating with law enforcement officers. In *Dietemann*, conversations between the reporters and the fraudulent doctor were secretly relayed to law enforcement officers for use in their investigation, and then used in a story published by the media. Like the media appellees here, the media defendants in *Dietemann* attempted to use the "invited informer" doctrine to escape liability. We rejected their defense and explained our decision as follows:

> Plaintiff's den was a sphere from which he could reasonably expect to exclude eavesdropping newsmen. He invited two of defendant's employees to the den. One who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves. But he does not and should not be required to take the risk that what is

> heard and seen will be transmitted by photograph or recording, or in our modem world, in full living color and hi-fi to the public at large or to any segment of it that the visitor may select. A different rule could have a most pernicious effect upon the dignity of man. . . .

Dietemann, 449 F.2d at 249.

We therefore hold that the Bergers had an expectation of privacy in their conversations with Agent Scrafford, and that appellees infringed that privacy when they recorded the Bergers' conversations inside the house.

The Media as Government Actors

The final issue we must consider in the Bergers' *Bivens* action is whether the media appellees may be held liable even though they were not agents or employees of the federal government. Ordinarily, *Bivens* liability and the corresponding liability of state actors under 42 U.S.C. § 1983, attaches only to the acts of government officials. *Johnson v. Knowles*, 113 F.3d 1114 (9th Cir. 1997). Private parties may be held liable, however, if they are deemed to have acted "under color of law." *Id.* at 1117 (citing *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983) (owners who obtained pervasive police assistance in evicting tenants were deemed to be joint actors with police)); *Ginn v. Matthews*, 533 F.2d 477 (9th Cir. 1976). *See also Reuber v. United States*, 750 F.2d 1039, 1058 (D.C. Cir. 1984), which held that "private status . . ., even if deemed a special factor, is not alone sufficient to counsel hesitation in implying a damages remedy when the private party defendants jointly participate with the government to a sufficient extent to be characterized as federal actors. . . ."

In deciding whether conduct of private parties amounts to government action we engage in a highly factual inquiry. *Howerton*, 708 F.2d at 383 (quoting *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, 81

S. Ct. 856, 860 (1961)). Four tests have been developed to facilitate this inquiry. *See Johnson* at 1118-20, where we explained each test. These tests are: (1) the governmental nexus test, *see Jackson v. Metropolitan Edison Co.* 419 U.S. 345, 351, 95 S. Ct. 449, 453(1974) (courts must consider whether there is a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the [s]tate itself"); (2) the public function test, *see Jackson,* 419 U.S. at 352, 95 S. Ct. at 454 (state action is present when a private entity exercises functions traditionally and exclusively reserved to the state); (3) the state compulsion test, *see Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S. Ct. 2777, 2786 (1982) ("a [s]tate normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either over or covert, that the choice must in law be deemed to be of the [s]tate"); and finally, (4) the joint action test, *see Dennis v. Sparks,* 449 U.S. 24, 27, 101 S. Ct. 183, 186 (1980) (private actors can be considered [government] actors if they are "willful participant[s] in joint action with the [government] or its agents").

The appropriate test in this case is the joint action test. The Supreme Court has said it is satisfied when the plaintiff is able to establish an agreement, or conspiracy between a government actor and a private party. *See Dennis,* 449 U.S. at 27-28, 101 S. Ct. at 186 (1980) ("Private persons, jointly engaged with [government] officials in the challenged action, are acting 'under color' of law for purposes of [*Bivens*] actions."); *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 152, 90 S. Ct. 1598, 1605 (1970) ("The involvement of a [government] official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's [constitutional rights], whether or not the actions of the [government official] were officially authorized, or unlawful."); *United*

States v. Price, 383 U.S. 787, 794, 86 S. Ct. 1152, 1156 (1966) ("Private persons, jointly engaged with [government] officials in the prohibited action, are acting 'under color' of law for purposes of [*Bivens*]."). Our cases are in accord. *See Howerton, supra*; *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1231 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 746 (1997); *Mathis v. Pacific Gas & Electric Co.*, 75 F.3d 498, 503 (9th Cir. 1996); *Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989) ("Joint action therefore requires a substantial degree of cooperative action."). *See also Gorenc v. Salt River Project Agr. Imp. & Power*, 869 F.2d 503, 507 (9th Cir. 1989) (quoting *Wilmington Parking Authority*, 365 U.S. at 725, 81 S. Ct. at 862, and explaining that joint action may take the form of a "symbiotic relationship" where the government has " 'so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity. . . .' ")

In this case we have not only a verbal agreement, but a written contractual commitment between the government and the media to engage jointly in an enterprise that only the government could lawfully institute—the execution of a search warrant—for the mutual benefit of both the private interests of the media and the government officials' interest in publicity. It is also alleged that the federal entities shared confidential information with the media. Indeed, the record in this case suggests that the government officers planned and executed the search in a manner designed to enhance its entertainment, rather than its law enforcement value, by engaging in, for example, conversations with Mr. Berger for the purpose of providing interesting soundbites, and to portray themselves as tough, yet caring investigators, rather than to further their investigation. This satisfies the joint action test.

At least one distinguished circuit judge has suggested that the media's entry onto searched premises by virtue of

government authority would alone be sufficient to constitute joint action. *See Parker,* 93 F.3d at 449 (Richard Arnold, J., dissenting). Judge Arnold noted that "[t]he news crew came to the location with the police and could not have entered if the police had not done so first. They did not simply happen along the street at the time that a search was being conducted." *Id.* Given the record before us, however, we need not go so far. This is because under our own circuit authority, the "inextricable" involvement of the media with both the planning and execution of this search, the government's active involvement with the media's news gathering activities, and the mutually-derived benefits, is more than enough to make the media government actors. *See Gorenc, supra,* quoting *Wilmington Parking Authority,* 869 F.2d 503.

The cases relied upon by the district court are unavailing because they involved situations in which the private parties conducted searches on their own, and not under the government's cloak of authority. *See United States v. Miller,* 688 F.2d 652, 657-58 (9th Cir. 1982); *United States v. Jennings,* 653 F.2d 107, 110 (4th Cir. 1981). In *Miller* a theft victim went to the defendent thief's property to look for his stolen trailer. Although a police officer acquiesced in the visit and provided some protection from afar by keeping watch through binoculars while the victim took photographs of his stolen trailer, the officer took no active part in the search. *Miller,* 688 F.2d at 656-58. In *Jennings,* a private party, an airline security manager, searched a package containing drugs, after receiving information from the Drug Enforcement Administration. The court held that notwithstanding the fact that a DEA agent passively observed the search, the search did not implicate the Fourth Amendment because the private entity independently decided to conduct the search, and acted for its own benefit, rather than as a surrogate for the government. *Jennings,* 653 F.2d at 110-11. While the media here collaborated with the goevrnment in order to

conduct a search for its own benefit, there was nothing passive about the government's involvement with the media in this case. They acted together.

FEDERAL WIRETAP STATUTE

Next, the Bergers claim that the media appellees violated the Federal Wiretap Act, 18 U.S.C. §§ 2510, *et seq.*, by intercepting for broadcast the Bergers' conversations with Agent Scrafford in the home. The Act is a broad prohibition against warrantless, surreptitious interceptions of wire, oral or electronic communications. 18 U.S.C. § 2511(1)(a)(c).

The Act, however, also contains a broad exception for conversations recorded by persons acting under color of law. That exception provides that:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party of the communication or one of the parties to the communication has given prior consent to such interception.

18 U.S.C. § 2511(2)(c).

We have held that the media appellees were acting under color of law for purposes of *Bivens* liability. We recognize that the scope of the phrase "under color of law" in the wiretap context is not equivalent to the scope of the phrase in the general section 1983 or *Bivens* context. *See, e.g., Thomas v. Pearl*, 998 F.2d 447, 450-51 (7th Cir. 1993). *Thomas* held that a basketball coach who was a university employee and who tape-recorded a conversation with an athlete was not acting "under color of law" for purposes of the Federal Wiretap Act. We agree that the "under color of law" exception under the Act was not created to exempt all government employees from liability for recording conversations when only one party

has consented: Its core aim must have been to exempt those acting under law enforcement authority. Because both the federal appellees and the media appellees were acting under authority of a search warrant, the exception applies, and because Agent Scrafford, a party to the conversations, consented to the interception, we hold the media appellees not liable under the Federal Wiretap Act.

STATE LAW CLAIMS

Trespass

The Bergers have asserted a claim against the media for trespass. The Bergers allege that the media committed the tort by (1) entering into their home, for which there was no warrant, and (2) by generally being present at the Bergers' ranch during the execution of a search warrant that they contend authorized only the law enforcement officers to enter their property. Trespass is generally premised upon the intentional interference with the property rights of another without consent. *See Ducham v. Tuma*, 877 P.2d 1002, 1005 (Mont. 1994). *Ducham* quoted Restatement (Second) of Torts § 158: "One is subject to liability . . . for trespass, irrespective of whether he thereby causes harm . . . (a) if he intentionally enters land in possession of the other, or causes a thing or third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove." *Id. See also* Restatement (Second) of Torts § 167 (consent is an absolute defense to trespass).

The district court held that the Bergers had no possessory interest in the ranch at the time of the search because the government agents had temporary possession and control of the Bergers' land during the execution of the search. *See, e.g., Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992), where the Sixth Circuit explained that where an intrusion is justified, the officers executing the search are "placed in control of the premises." *Bills* recognized, however, that

such control does not authorize law enforcement officers to invite third parties on the premises for reasons unrelated to law enforcement. *Id.* The warrant therefore does not justify the media intrusion here, because the officers invited the media for newsgathering, not for law enforcement.

The district court's reasoning is even more problematic insofar as it was applied to the media's entry into the Berger home, a place that the government did not have a warrant to search. Although Mr. Berger consented to Agent Scrafford's initial entry into the home, he never consented to the entry of the media-owned microphone that Agent Scrafford wore. In addition, the media could not have benefitted derivatively from the consent extended to Agent Scrafford, because without a warrant, Agent Scrafford was not in control and possession of the home, and therefore, had no valid authority to supply the requisite consent.

The media's contention that their entry was impliedly consented to by "custom and usage," is also unavailing. *See Florida Pub. Co. v. Fletcher*, 340 So.2d 914 (Fla. 1977) (implying consent from a longstanding "custom and usage" of permitting the media to enter private property where a conflagration had consumed a house, causing death, and where the Florida Supreme Court characterized the fire as "a disaster of great public interest," and a "calamity"). *Fletcher* involved a disaster, which this case does not. Other courts have similarly distinguished *Fletcher* on its facts. *See Prahl*, 295 N.W.2d at 779, *WROC-TV*, 441 N.Y.S.2d at 223.

Although neither the district court nor this court has exhaustively researched Montana trespass law, we have no reason to believe it departs from the generally recognized principles we have discussed. We therefore remand for the district court's further consideration of the Bergers' claim for trespass against the media.

Conversion

The Bergers sued the media appelees for conversion on the basis of the media's capture of their images and voices. The district court found that recorded sounds and images cannot be the subject of a conversion claim. We agree.

To make out a valid conversion claim under Montana law, a plaintiff must prove that (1) he owns the property converted, (2) has a right to its possession, (3) the converter exercised unauthorized dominion over that property, and (4) the property owner has suffered damages as a result of the conversion. *Eatinger v. Johnson*, 887 P.2d 231, 234 (Mont. 1994) (citation omitted). The Bergers' images and sounds are intangible, and intangible property interests have not traditionally been subject to conversion. *See* Prosser & Keeton, Law of Torts § 15 (5th ed. 1985); Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 101[B](1)(i) (1995) ("The torts of conversion and trespass relate to interference with tangible rather than intangible property. . . ."). Although the common law rule has been relaxed somewhat, and the tort may now reach the misappropriation of intangible rights customarily merged in or identified with some document, it has not yet been extended further. *See Restatement* (Second) of Torts, § 242 and comments; *Hurst v. Dezer/Reyes Corp.*, 82 F.3d 232, 236 (8th Cir. 1996) (holding that even under the "expanded definition of the tort" under New York law, the business concept and appearance of a diner could not be "converted" since the claimed property rights were not rights customarily merged in a document; *Zacchini v. Scripps-Howard Broadcasting Co.*, 351 N.E.2d 454, 457 (Ohio 1976) ("it has never been held that one's countenance or image is 'converted' by being photographed"). No Montana court has recognized a cause of action for the "conversion" of sounds and images. The Bergers, therefore, have not stated a claim for conversion.

Intentional Infliction of Emotional Distress

Under Montana law, this cause of action may arise "if there was serious or severe emotional distress to the plaintiff which was a reasonable foreseeable consequence of the defendant's negligent or intentional act or omission." *See Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411, 429 (1995).

The district court rejected this claim on the ground that it had already found that none of the media appellees' acts were unlawful, and therefore, emotional distress could not have been a reasonably foreseeable consequence of their actions.

In light of our holding that the Bergers have alleged a claim of interference with both their privacy and their property interests, we also remand this claim to the district court for reconsideration upon a fully developed record.

INJUNCTION

The Bergers also sought an injunction preventing the media appellees from further broadcast of any or all parts of the video and sound gathered during the search. We agree with the district court that this is essentially a request for a prior restraint, which carries a "heavy presumption against its constitutional validity." *CBS, Inc. v. Davis*, 510 U.S. 1315, 114 S. Ct. 912, 914 (1994) (Blackmun, Circuit Justice, staying preliminary injunction) (citations omitted). Even though the Bergers have alleged triable claims for damages arising out of the manner in which the media appellees obtained the material, such allegations are not sufficient to support the imposition of an injunction. *See New York Times Co. v. United States*, 403 U.S. 713 (1971) (refusing to enjoin publication of the Pentagon Papers).

CONCLUSION

We reverse the district court's judgment in favor of the federal appellees in the Bergers' *Bivens* claim, and also reverse the judgment in favor of the media appellees on that claim. We also reverse and remand the judgment in favor of the media appellees on the Bergers' state law claims for trespass and intentional infliction of emotional distress, but otherwise affirm the judgment of the district court.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART for further proceedings. Costs are awarded to Appellants.

APPENDIX B

[Filed Feb. 26, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Cause No. CV-95-46-BLG-JDS

PAUL W. BERGER and ERMA R. BERGER,
Plaintiffs,

vs.

RODNEY HANLON, JOEL SCRAFFORD, RICHARD C. BRANZELL, ROBERT PRIEKSAT, KRIS A. MCLEAN, TURNER BROADCASTING SYSTEMS, INC., a Georgia corporation, ROBERT RAINEY, DONALD HOOPER, and UNITED STATES OF AMERICA,

Defendants.

MEMORANDUM AND ORDER

Pending before this Court is the federal defendants' motion to dismiss or, in the alternative, for summary judgment. The "federal defendants" as referred to in this order are United States Department of Interior's Fish and Wildlife Service (FWS) Special Agents Hanlon, Scrafford, Branzell, and Prieksat, and Assistant United States Attorney (AUSA) McLean. Incorporated in the federal defendants' motion is a request that this Court take judicial notice of the information filed May 5, 1993 in *United States v. Paul W. Berger*, and of excerpts from testimony given by Special Agent Joel Scrafford in the matter. Also pending is the motion for summary judgment filed by defendants Turner Broadcasting Systems, Inc. (TBS), Robert Rainey (Rainey), and Donald Hooper (Hooper).

Rainey and Hooper were members of the Cable News Network (CNN) camera crew which filmed the execution of the search warrant. After hearing oral arguments and reviewing the briefs, this Court is prepared to rule on the motions.

BACKGROUND

The plaintiffs in this case are Garfield County ranchers Paul W. Berger (Berger) and his wife Erma R. Berger (Mrs. Berger). An investigation was initiated after former employees of Berger contacted Montana Fish and Game Service officials alleging that Berger used poisons to kill predators on his ranch, including eagles. In connection with the investigation of Berger, the FWS obtained a search warrant for the Berger ranch. This action arises from the March 24, 1993 execution of that federal search warrant by FWS agents.

Sometime prior to the execution of the warrant, CNN was given permission to accompany the government while agents executed the search warrant. The CNN crew accompanied federal and state agents during the execution of the search warrant. CNN later broadcast a news story about ranchers killing predators. The investigation and prosecution of Berger were featured in the story. On March 21, 1995, this lawsuit was filed. The Bergers allege that in executing the search warrant, federal defendants and defendants TBS, Rainey, and Hooper violated their Fourth Amendment right to be free from unreasonable searches and seizures. Additionally, the Bergers allege trespass against TBS, Rainey, Hooper and AUSA McLean; conversion against TBS, Rainey and Hooper; intentional infliction of emotional distress against TBS, Rainey, and Hooper; and a violation of the federal wiretapping statute, 18 U.S.C. § 2511, against TBS, Rainey and Hooper.

I. *The federal defendants' Motion to Dismiss or, in the alternative, for Summary Judgment.*

Standard of Review

When deciding a motion for summary judgment, the Court generally looks to whether material issues of fact are in dispute. Fed.R.Civ.P. 56(e). However, when the summary judgment motion is based on qualified immunity, a court must consider the law as it was established at the time of the incident. *Romero v. Kitsap County*, 931 F.2d 624, 628 (9th Cir. 1991).

The defense of qualified immunity applies to government officials and protects all "but the plainly incompetent or those who knowingly violate the law." *Schroeder v. McDonald*, 55 F.3d 454, 461 (1995) (citations omitted). Even officials who violate the Constitution are to be accorded qualified immunity and, therefore, escape money damages if, in their performance of discretionary duties, their actions do not violate "clearly established constitutional or statutory rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Elder v. Holloway*, 114 S. Ct. 1019, 1021 (1994). Under the summary judgment standard for qualified immunity, the Court must determine if the plaintiff has alleged a violation of law that was clearly established at the time of the alleged violation. *See Romero*, 931 F.2d at 627-28. If the law was not clearly established, then the official is immune from suit as a matter of law, any factual disputes are rendered immaterial, and summary judgment is appropriate. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Romero*, 931 F.2d at 628. The determination of whether an asserted federal right was clearly established at a particular time is a question of law. *Elder*, 114 S. Ct. at 1023.

Therefore, the qualified immunity test essentially requires the following three steps: 1) the identification of the specific right allegedly violated; 2) the determination of whether that right was so "clearly established" that a reasonable officer would have been aware of it; and 3) the determination of whether a reasonable officer could have believed that the conduct at issue was lawful. *Romero*, 931 F.2d at 627.

The question to be answered in this case is whether on March 24, 1993 it was clearly established that the Bergers' Fourth Amendment freedom from unreasonable searches and seizures was violated when government agents executing a valid search warrant allowed representatives of the news media to observe and document the search. The contours of the right must have been sufficiently clear in 1993 that a reasonable official would have understood that what he was doing violated that right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In light of pre-existing law, the unlawfulness of the act must have been apparent. *Id.* If the law was not clearly established, then summary judgment must be granted.

Discussion

A. *Motion for Summary Judgment*

In their motion, defendants ask the Court for an order finding that federal law enforcement agents who allowed a news media camera crew to accompany them during the execution of a valid search warrant did not violate any clearly established Fourth Amendment rights and that, therefore, they are entitled to qualified immunity. *See Harlow*, 457 U.S. at 818 (if law was not "clearly established" at time of incident, then summary judgment is proper). The Bergers contend that it was clearly established at the time of the search that it is a violation of the Fourth Amendment to allow a media camera crew at

the execution of a search warrant for reasons other than a legitimate law enforcement purpose.

The operation of the *Harlow* qualified immunity standard greatly depends upon the level of generality in which the relevant "legal rule" is identified. *Anderson*, 483 U.S. at 639; *Camarillo v. McCarthy*, 998 F.2d 638, 640 (9th Cir. 1993). A plaintiff who has a suit based upon a constitutional tort cannot circumvent the plainly established rule of qualified immunity simply by alleging violations of extremely abstract rights. *Anderson*, 483 U.S. at 639. The *Anderson* Court noted as an example of abstract rights that "the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right." *Anderson*, 483 U.S. at 639. The right referred to by the *Harlow* test is not a general constitutional guarantee, but rather it is the application in a particular context. *See Todd v. United States*, 849 F.2d 365, 370 (9th Cir. 1988).

The *Harlow* standard is an objective inquiry. *Kirkpatrick v. Los Angeles*, 803 F.2d 485, 490 (9th Cir. 1986). A plaintiff seeking damages from a government official bears the threshold burden of demonstrating that the constitutional rights at issue were clearly established at the time of the officer's allegedly unlawful act. *See e.g., Shoshone-Bannock Tribes v. Fish & Game Comm'n of Idaho*, 42 F.3d 1278, 1285 (9th Cir. 1994); *Davis v. Scherer*, 468 U.S. 183, 197 (1984). In deciding whether the law was clearly established at the relevant time, the court must "survey the legal landscape" as it existed at the time of the conduct in question. *Figueroa v. United States*, 7 F.3d 1405, 1409 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1537 (1994); *Wood v. Ostrander*, 879 F.2d 583, 591 (9th Cir. 1989), *cert. denied* 498 U.S. 938 (1990).

The survey of the legal landscape begins by examining the binding Supreme Court and Ninth Circuit decisions. *Kirkpatrick*, 803 F.2d at 490. In the absence of binding Supreme Court or Ninth Circuit precedent, courts in this circuit reviewing a qualified immunity defense must look to all available decisional law, including cases from other state, circuit, and district courts. *Figueroa*, 7 F.3d at 1409; *Wood*, 879 F.2d at 591. The analysis begins by examining those cases that are "most like" the instant case. *Figueroa*, 7 F.3d at 1409. Finally, because the question is whether the relevant law was so clearly established at the time of the conduct at issue that a reasonable officer could be said to "know" his conduct was unlawful, post-incident decisions may not be considered. *See Harlow*, 457 U.S. at 818-19; *Baker v. Racansky*, 887 F.2d 183, 187 (9th Cir. 1989).

The Bergers attempt to satisfy their burden of demonstrating that the constitutional rights at issue were clearly established by relying on *United States v. Sanusi*, 813 F. Supp. 149, 157-59 (E.D.N.Y. 1992), and *Ayeni v. CBS, Inc.*, 848 F. Supp. 362, 368 (E.D.N.Y. 1994). The *Ayeni* case arose from the search underlying the *Sanusi* case. Both cases, however, can be distinguished.

The *Sanusi* case involved the news-gathering privileges of the media and whether the media had to turn over to the defendent a videotape taken at the execution of a search warrant. The case did not involve the question of qualified immunity.

The district court in *Ayeni* was affirmed by the Second Circuit in *Ayeni v. Mottola*, 35 F.3d 680 (1994), *cert. denied*, 115 S. Ct. 1689 (1995). The *Ayeni* case is distinguishable because the Second Circuit Court allowed the plaintiff to defeat the rule of qualified immunity by addressing and analyzing the alleged violation of an extremely abstract right. Unlike the search in the case at bar, the *Ayeni* case involved the search of a home, where

privacy interests are at their greatest. The *Ayeni* Court addressed the general Fourth Amendment right to privacy and held that the right had been violated when a news crew entered the house during the execution of a search warrant. *Ayeni*, 35 F.3d at 686.[1] The Sixth Circuit and this Court recognize the error made by the Second Circuit. *See Bills v. Aseltine*, 52 F.3d 596 (6th Cir. 1995) (criticizing the *Ayeni* Court for describing the violation in abstract and general terms, contrary to the Supreme Court's instructions in *Anderson*).

Additionally, the *Ayeni* case was decided subsequent to the Berger search. Therefore, the holding in the case should not be considered in determining whether the law was clearly established at the time the events at issue occurred. *See Baker*, 887 F.2d at 187 (post-incident decisions cannot clearly establish the law at the time of the conduct in question).

Furthermore, citing to *United States v. Wright*, 667 F.2d 793 (9th Cir. 1982), and *United States v. Clouston*, 623 F.2d 485 (6th Cir. 1980), the Bergers assert that existing case law establishes that it is unconstitutional for officers to delegate their authority or to bring private persons along to execute warrants unless the private persons are necessary to provide reasonable assistance in the execution of the warrant. Both of these cases, however, involved persons who actively participated with the officers in a search for evidence. These cases demonstrate only

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[1] In analyzing the general Fourth Amendment right instead of the specific application of that right, the *Ayeni* Court stated that it has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties. The court concluded that a special agent exceeded those well-establishd principles when he brought into the plaintiff's home a television news crew that was neither authorized by the warrant nor serving any legitimate law enforcement purpose. *Ayeni*, 35 F.3d at 686.

that at the time of the Berger search the Fourth Amendment did not prohibit the use of a third party at a search if that party was aiding the officer in searching for items either specified in the warrant or within plain view of those items specified. *See Wright*, 667 F.2d at 797 (officer executing a warrant that authorized seizure of driver's license may utilize assistance of law enforcement officer involved in separate narcotics conspiracy investigation involving same people); *Clouston*, 623 F.2d at 486-87 (presence of telephone company employee, who was used to identify equipment reasonably believed to be found near equipment specified in warrant, did not render search unconstitutional). The cases did not involve the question of the lawfulness of allowing media representatives to observe and document the searching officers' own execution of a warrant. In fact, the media was not involved in either case.

Finally, in a supplemental filing, the plaintiffs presented the case of *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995) in support of their position. The *Buonocore* decision is distinguishable because the case involved law enforcement officers inviting a private person to engage in an independent general search of the home for items never mentioned in the warrant. *Buonocore*, 65 F.3d at 350. Furthermore, although the search in *Buonocore* took place late in 1992, the decision was rendered years after the 1993 Berger search.

The plaintiffs also argue that no binding decision permitted the defendants' action. But, that is not the standard that we are to follow. The Court is to examine the law at the time of the conduct at issue and determine if that law was so clearly established that a reasonable officer should "know" his conduct was unlawful. For qualified immunity to apply, the law at the time does not have to specifically permit or authorize the defendants' actions, it simply has to fall short of clearly establishing that the conduct was unlawful.

No case at the time of the search directly stated the proposition that allowing media observers to attend the execution of an otherwise valid search violated the constitutional rights of one whose property was the subject of the search. To the contrary, the case law at the time suggested that the presence of media observers did not violate constitutional rights.

The federal defendants cite to several cases to demonstrate that decisional law did not "clearly establish" the proposition that government agents executing a warrant violated constitutional rights by allowing media representatives to attend and observe. For example, in *Avenson v. Zegart*, 577 F. Supp. 958 (D. Minn. 1984), the Court found that officers did not violate the Fourth Amendment when they told the media what time the search would be executed and then refused to make the media leave during the execution of the warrant, even though the property owner asked that they be removed. The federal defendants also cite two unpublished district court cases, *Higbee v. Times-Advocate*, 5 Med. L. Rptr. 2372 (S.D. Cal. Jan. 9, 1980) and *Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio Jan. 6, 1984). In both cases, summary judgment was entered in favor of defendants who allowed media coverage at the execution of a search warrant.

Another case cited by the federal defendants, *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980), was dismissed when police allowed a reporter, who learned about the search on the police scanner, to observe the search. The court stated that it was uwilling to accept the proposition that an otherwise reasonable search would be made unreasonable by the filming and television broadcast of the search. *Id.* at 774.

The Bergers attack these cases because two are unpublished, the other is a state court case, and none are authoritative. But, the cases cited by the federal defendants help demonstrate that courts (and officers) were lacking

clear authority on this issue at the time of the Berger search.

In addition to case law, the Bergers also rely on 18 U.S.C. § 3105, which identifies who may serve search warrants. The Bergers argue that the statute provides guidance on the constitutional issue of what constitutes "reasonableness" under the Fourth Amendment. The statute provides:

> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

18 U.S.C. § 3105 (1985).

The case at bar does not involve a situation in which CNN was helping to serve or execute the warrant. CNN was simply observing the agents who were serving the warrant. The statute prevents officers who obtain a warrant from using the warrant themselves or allowing others to use the warrant as a means of expanding an otherwise valid and judicially-approved search into a general search for things not specified in the warrant. Neither 18 U.S.C. § 3105 on its face nor pre-March 1993 case law interpreting the statute clearly establish that the presence of a news crew, or any other third person observer not actively participating in a search or seizure, violates the Fourth Amendment.

The mere fact that later cases may have extended pre-existing legal principles in a way that makes the defendants' conduct unlawful does not mean that the unlawfulness of that conduct was "clearly established" at the time of the search. *See Mitchell v. Forsyth*, 472 U.S. 511, 530-35 (1985). When "all available decisional law" at the relevant time is considered, the most that can be said of the legal landscape as it stood in March 1993 is

that the law was perhaps beginning to evolve toward the view that the Fourth Amendment may prohibit the presence of media observers during the execution of a valid search warrant. This Court finds that the law was not clearly established in March 1993 and, therefore, the FWS agents and AUSA McLean are entitled to qualified immunity.

II. *Motions for Judicial Notice*

In addition to their brief and statement of uncontroverted facts in support of their motion, the federal defendants rely on the Certification of Scope of Employment as prepared by Helene M. Goldberg, Director of the Torts Branch, Civil Division, United States Department of Justice. The Bergers do not oppose the defendants' motion that this Court take judicial notice of the certification. The Court grants the defendants' request for certification.

The federal defendants also ask this Court to take judicial notice of certain materials from the proceedings in the matter of *United States v. Paul W. Berger, No.* CR 93-46-BLG-RWA (D. Mont.). Specifically, they ask that notice be taken of the information filed May 5, 1993, and of excerpts from testimony given August 11, 1993 by Special Agent Joel Scrafford in the same matter. The defendants hardily contest the motion. The Court did not rely on the material in determining whether the law at issue was clearly established at the time of the Berger search. However, the Court did not consider the motion for judicial notice on its merits. The motion is moot.

III. *The defendants' (TBS, Rainey, and Hooper) motion summary judgment.*

The defendants TBS, Rainey, and Hooper are moving this Court for summary judgment. TBS is engaged in the business of broadcasting entertainment, news and information programs. Rainey and Hooper are agents of CNN

and served on the camera crew during filming of the execution of the Berger search.

Standard of Review

First, the Court finds it instructive to review the standards applicable to motions for summary judgment. Fed.R.Civ.P. 56(c) states summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party must initially identify those portions of the record before the Court which it believes establish an absence of material fact. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n.*, 809 F.2d 626, 630 (9th Cir. 1987). If the moving party adequately carries its burden, the party opposing summary judgment must then "set forth specific facts showing that there is a genuine issue for trial." *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103-04 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986).

All reasonable doubt as to the existence of genuine issues of material fact must be resolved against the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Nevertheless, "[d]isputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv.*, 809 F.2d at 630 (*citing, Liberty Lobby*, 477 U.S. at 248). "A 'material' fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense." *Id.*

If a rational trier of fact might resolve disputes raised during summary judgment proceedings in favor of the nonmoving party, summary judgment must be denied. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475

U.S. 574, 587 (1986). Thus, the Court's ultimate inquiry is whether the "specific facts" set forth by the nonmoving party, viewed along with the undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence. *Id.* at 631. Having so stated, the Court now turns to the merits of the pending motion.

Discussion

The defendants TBS, Rainey, and Hooper (the media defendants) move for summary judgment on four grounds. First, the media defendants claim that the Bergers' constitutional claims were already litigated in the criminal case and their action is barred by collateral estoppel. Second, they argue that as a matter of law, there is no constitutional, statutory or common law liability for recording voluntary conversations with law enforcement officers or videotaping areas outside the family residence. Third, they allege that the Bergers have failed to plead or otherwise satisfy the standards required under the First Amendment for the requested injunction. Finally, the media defendants allege that the Bergers cannot fulfill the requirements for their common law theories.

A. *Collateral Estoppel*

The media defendants claim that the Bergers' constitutional claims were already litigated in the criminal case and their action is barred by collateral estoppel. The Bergers, however, argue that the action is not barred because the issues in the two cases are different. Specifically, the plaintiffs assert that the Fourth Amendment was not previously adjudicated, that TBS's involvement was not considered, and that Mrs. Berger was not a party.

The Bergers' arguments are not persuasive. CNN and TBS shared the same role in the search; they are essentially one in the same. Consideration of CNN's involve-

ment in the prior suit is essentially consideration of TBS's involvement. The same argument holds true for Mrs. Berger. She is in privity with Mr. Berger. She held the same position as Mr. Berger and went through the same experience. If his rights were not violated, her rights were not violated.

In the criminal case against Berger, the defendant sought to suppress evidence obtained in the search on the basis that his Fourth Amendment rights had been violated. *United States v. Paul W. Berger*, CR 93-46-BLG-RWA (D.Mont. 1993). Berger argued that the search was illegal. Magistrate Judge Anderson held a full hearing on these issues. Because the search conducted at the ranch did not violate the Fourth Amendment, Magistrate Judge Richard W. Anderson denied the suppression motion. In the case at bar, the plaintiffs are again arguing that their Fourth Amendment rights were violated by the search.

Magistrate Judge Anderson's holding in the criminal case, however, bars a *Bivens* action in this case. *See Matthews v. Macanas*, 990 F.2d 467, 468 (9th Cir. 1993) (if a court in a criminal case holds that a search warrant is supported by probable cause and constitutional rights were not violated, a subsequent *Bivens* civil action is barred by collateral estoppel); *Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 762 (9th Cir. 1991) (plaintiff estopped from bringing a civil action because issue determined in criminal case), *cert. denied*, 502 U.S. 1091 (1992). A *Bivens* action authorizes a cause of action against persons, acting under color of federal law, for violations of constitutional rights. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Because the constitutionality of the search has already been litigated, the causes of action based on the constitutionality of the search are barred by collateral estoppel.[2]

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[2] The videotaping of an execution of a valid search and seizure warrant does not render an otherwise reasonable search and seizure

The Bergers' Fourth Amendment claims against the media defendants arising from the videotaping of various places on the ranch also fail because the media defendants were not acting under color of law when they filmed the execution of the search. When a private party, such as TBS, is present during a search as a means of furthering its own interests, it is not acting under color of federal law and is not liable under *Bivens*. *See United States v. Miller*, 688 F.2d 652, 657-58 (9th Cir. 1982); *United States v. Jennings*, 653 F.2d 107, 110 (4th Cir. 1981). In this case, the defendants were not acting under the color of federal law.[3]

B. *Federal wiretap statutes*

The Bergers claim that the media defendants "intercepted" their communications with the federal officers in violation of the Wiretap Act. The media defendants are entitled to summary judgment on the wiretap claims because the federal agents consented to the recording.

The Wiretap Act prohibits the intentional interception of certain communications, but expressly allows persons to intercept and record communications under certain other conditions. Section 2511(2)(d) of the Act provides in pertinent part that:

> [i]t shall not be unlawful . . . for a person not acting under color of law to intercept a[n] . . . oral . . . communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the

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unreasonable. *Prahl v. Brosamle*, 295 N.W.2d 768, 774 (Wis. Ct. App. 1980).

[3] To establish a *Bivens* action, the Bergers must prove that the media defendants (1) acted under the color of federal law and (2) deprived them of constitutionally protected rights. Because this Court determined that one prong was not met, this Court need not analyze the second prong.

> purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C. § 2511(2)(d) (1970 & Supp. 1995).

The statute specifically provides that it is not unlawful to intercept oral communication where one of the parties has given prior consent. In the case at bar, law enforcement consented to TBS recording the conversations. The exception to this statute does not apply because this Court does not find that the media defendants made the recordings for the purpose of committing a crime or tortious act. Instead, the recordings were made for the purpose of producing a news story and for the defendants' commercial gain. Since the Act provides that there is no liability to a third party if one party to the conversation consents to the third party recording and since the exception does not apply, the media defendants did not violate the Wiretap Act. *See, e.g., Desnick v. American Broadcasting Co., Inc.*, 44 F.3d 1345, 1353 (7th Cir. 1995) (wiretap statutes allow one party to have conversation recorded unless his purpose is to commit a crime or tort); *United States v. Mullins*, 992 F.2d 1472, 1478 (9th Cir. 1993) (no violation of Fourth Amendment where one party consented to the monitoring of wire communications), *cert. denied* 114 S.Ct. 556 (1993).

C. *Request for Injunction*

The Bergers seek an injunction preventing TBS, Rainey, and Hooper from broadcasting or selling all or part of the videotape and recordings gathered during the search. They make this request though the segment has already been broadcast several times and has not aired in more than a year.

The request is essentially a request for a prior restraint, which carries a "heavy presumption against its constitutional validity." *CBS, Inc. v. Davis*, 114 S. Ct. 912, 914

(1994) (citations omitted). The term "prior restraint" is used to describe administrative and judicial orders issued in advance of the time that communications are to occur and forbidding that those communications occur. *Alexander v. United States*, 113 S. Ct. 2766, 2771 (1993). While the prohibition against prior restraints is not absolute, the gagging of publication has been considered acceptable only in "exceptional cases." *CBS*, 114 S. Ct. at 914.

The plaintiffs have not shown that this case is an exceptional case that would justify the imposition of a prior restraint.

D. *Common law Claims*

The Bergers have pled several state law claims against TBS, Rainey and Hooper, including conversion, trespass, and intentional infliction of emotional distress.[4]

1. *Conversion*

In their conversion count, the plaintiffs allege that the media defendants intentionally and wrongfully entered the Berger Ranch and wrongfully seized and appropriated both statements and private images of the Bergers, their premises, and possessions. The media defendants contend that the images and voices cannot be the subject of a conversion action.

The elements necessary for a conversion action in Montana include ownership of property, a right of possession, unauthorized dominion over that property by another, and damages that result. *Eatinger v. Johnson*, 887 P.2d 231,

[4] The amended complaint also pled a claim of trespass against AUSA McLean. The United States was later substituted as the sole defendant for the claim of trespass against AUSA McLean pursuant to the Federal Employees Liability Reform and Tort Compensation Act. The claim against the United States for trespass was recently dismissed without prejudice by this Court in its December 15, 1995 and December 20, 1995 Orders.

234 (Mont. 1995). The Ninth Circuit has held that three criteria must be met before the law will recognize a property right. First, there must be an interest capable of precise definition. Second, that interest must be capable of exclusive possession or control. Finally, the putative owner must have established a legitimate claim to exclusivity. *Rasmussen & Assocs. Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 903 (9th Cir. 1992), *cert. denied* 113 S.Ct. 2927 (1993).

The Montana Supreme Court has never held that recorded sounds and images can be the subject of a conversion action. Other courts however have concluded that they cannot. *See, e.g., Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 883 (9th Cir. 1988) (use of one's photographic image is not proper grounds for conversion action), *cert. denied* 489 U.S. 1080 (1989); *Zacchinin v. Scripps-Howard Broadcasting Co.*, 351 N.E.2d 454, 457 (Ohio 1976) (one's image is not converted by being photographed), *rev'd on other grounds*, 433 U.S. 562 (1977); *Ippolito v. Lennon*, 542 N.Y.S.2d 3, 6 (N.Y. App. Div. 1989) (any possible interest by musician in his performance contained on video and sound recording is intangible and not actionable as conversion). *See also, FMC Corp. v. Capital Cities/ABC*, 915 F.2d 300, 303 (7th Cir. 1990) (retaining copies of documents not sufficient to constitute conversion). This Court agrees with those courts that have found that the use of photographed or videotaped images and sound recordings does not give rise to a cause of action for conversion.

Conversion requires the intentional exercise of dominion and control over a chattel. *Ault v. Hustler Magazine, Inc.*, 860 F.2d at 883. The Bergers assert that the twenty-two tapes containing the images and statements of the Bergers are tangible chattel giving rise to the conversion action. The plaintiffs' argument was rejected by the Ninth Circuit in *Ault*. The *Ault* Court held that the photographs were the property of the photographer, not of the person

photographed. *Id.* While the tapes may be viewed as tangible chattel, it is the chattel of the defendants, not of the Bergers. Therefore, there was no conversion of Berger's chattels. *Id.*

2. *Trespass*

The Bergers also allege that the media defendants trespassed when they entered the Berger ranch to observe the execution of the search warrant. Consent of the owner, possessor, or another authorized to consent, however, is an absolute defense to trespass. *See Salisbury Livestock Co. v. Credit Union*, 793 P.2d 470, 475 (Wyo. 1990).

In this case, the federal government had temporary control and possession of the property while executing the search warrant. CNN had the permission of the federal government to be present during the execution of the search warrant.[5] The plaintiffs' amended complaint acknowledges that permission was given by the government. The letter from CNN to AUSA McLean dated March 11, 1993 was sent to confirm that permission. (Pl's Statement of Facts, Exhibit A).

Furthermore, the media defendants did not invade the property interests protected by the tort of trespass. *See Desnick*, 44 F.3d at 1352. The execution of the warrant was not disrupted by the presence of the media. The media was present for the purpose of news coverage only. In this case, the recorded transcript from CNN submitted by the plaintiffs, along with their attorney's affidavit in response to this motion, does not reveal that the crew was asked to leave, even though Mr. Berger apparently acknowledged that his picture was being taken. (Lansing's

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[5] This Court has already ruled that the government agents have qualified immunity for their actions in allowing the media to accompany them. The media's reliance on that permission was not unreasonable.

Aff., Ex. 8 at tape 08 page 13). Furthermore, any argument that the Bergers did not know the crew was a news crew is not dispositive. "[C]onsent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent." *Desnick*, 44 F.3d at 1351.

This Court finds that the media defendants are not liable under a cause of action for trespass.

3. *Intentional Infliction of Emotional Distress*

Finally, the Bergers allege a cause of action for intentional infliction of emotion distress. Montana allows a separate cause of action alleging intentional infliction of emotional distress. *Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411 (1995). This independent cause of action may arise if there was serious or severe emotional distress to the plaintiff which was a reasonably foreseeable consequence of the defendant's negligent or intentional act or omission. *Sacco*, 896 P.2d at 429. It is a question of law whether a plaintiff has introduced sufficient evidence to support a prima facie case for intentional infliction of emotional distress. *Sacco*, 896 P.2d at 427.

This Court has already found that the media defendants did not trespass when they accompanied the government during the execution of the search warrant. They are also not liable for recording conversations during the search or for capturing videotaped images of plaintiffs. Furthermore, the media defendants are not liable for broadcasting a truthful, newsworthy story. Since no tortious conduct took place, emotional distress was not a reasonably foreseeable consequence of their actions. The Bergers' intentional infliction of emotion distress claim fails.

E. Declaratory Judgment

The Bergers are asking for declaratory judgment declaring essentially that the federal agents and the media defendants violated the Bergers' constitutional rights. The declaratory relief sought is redundant of the claims already addressed in this opinion.

Courts generally recognize two criteria for determining whether declaratory relief is appropriate: "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Eureka Fed. Sav. and Loan Ass'n v. American Cas. Co. of Reading, Pa.*, 873 F.2d 228, 231 (9th Cir. 1989) (citations omitted). In light of this opinion, the declaratory judgment requested by the Bergers is not warranted.

Accordingly,

IT IS ORDERED:

1. The federal defendants' motion for summary judgment is granted.

2. The federal defendants' request for judicial notice of the Certification of Scope of Employment is granted.

3. The federal defendants' request for judicial notice is moot.

4. The media defendants' motion for summary judgment is granted.

5. In light of these rulings, the plaintiffs' motion to set preliminary pretrial conference is denied as moot.

6. The Clerk of Court shall forthwith enter summary judgment in favor of the defendants and against the plaintiffs.

The Clerk of Court is directed to forthwith notify the parties of the making of this order.

DONE and DATED this 26th day of February, 1996.

/s/ Jack D. Shanstrom
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Cause No. CV 94-46-BLG-JDS

PAUL W. BERGER and ERMA R. BERGER,
Plaintiffs,

vs.

CABLE NEWS NETWORK, INC.,
a Georgia corporation,
and JACK HAMANN,
Defendants.

MEMORANDUM AND ORDER

Pending before this Court is a motion for summary judgment by defendants Cable News Network, Inc. (CNN) and Jack Hamann. CNN is engaged in the business of broadcasting entertainment, news and information programs. Jack Hamann is a reporter working for CNN and was present during the filming of the execution of the Berger search. The Court has heard oral arguments on the motion and has considered the submitted briefs. For the reasons set forth below, the motion is granted.[1]

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[1] The Bergers have a related case pending in this Court against federal officials and other media defendants, CV 95-46-BLG-JDS. The motion before the Court today is practically identical to the motion for summary judgment filed by the media defendants in the related case. The briefing and theories are identical except for changes in the party names. For this reason, this opinion and the opinion written in that case are essentially the same except for the party names.

BACKGROUND

The plaintiffs in this case are Garfield County ranchers Paul Berger (Berger) and his wife Erma Berger (Mrs. Berger). An investigation was initiated after former employees of Berger contacted Montana Fish and Game Service officials alleging that Berger used poisons to kill predators on his ranch, including eagles. In connection with the investigation of Berger, the FWS obtained a search warrant for the Berger ranch. This action arises from the March 24, 1993 execution of that federal search warrant by FWS agents.

Sometime prior to the exeution of the warrant, CNN was given permission to accompany the government while agents executed the search warrant. The CNN crew accompanied federal and state agents during the execution of the search warrant. CNN later broadcast a news story about ranchers killing predators. The investigation and prosecution of Berger were featured in the story. The Bergers bring this action alleging that in executing the search warrant, CNN and Jack Hamann violated their Fourth Amendment right to be free from unreasonable searches and seizures. They also allege that the defendants violated the Federal Wiretapping Act. Finally, the Bergers allege trespass, conversion, and intentional infliction of emotional distress against the defendants. This case was removed from the District Court of the Sixteenth Judicial District of the State of Montana, Garfield County on April 22, 1994.

STANDARD OF REVIEW

First, the Court finds it instructive to review the standards applicable to motions for summary judgment. Fed.R.Civ.P. 56(c), states summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

any material fact and that the moving party is entitled to judgment as a matter of law." The moving party must initially identify those portions of the record before the Court which it believes establish an absence of material fact. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n.*, 809 F.2d 626, 630 (9th Cir. 1987). If the moving party adequately carries its burden, the party opposing summary judgment must then "set forth specific facts showing that there is a genuine issue for trial." *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103-04 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986).

All reasonable doubt as to the existence of genuine issues of material fact must be resolved against the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Nevertheless, "[d]isputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv.*, 809 F.2d at 630 (*citing, Liberty Lobby*, 477 U.S. at 248). "A 'material' fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense." *Id.*

If a rational trier of fact might resolve disputes raised during summary judgment proceedings in favor of the nonmoving party, summary judgment must be denied. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Thus, the Court's ultimate inquiry is whether the "specific facts" set forth by the nonmoving party, viewed along with the undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence. *Id.* at 631. Having so stated, the Court now turns to the merits of the pending motion.

DISCUSSION

The defendants CNN and Hamann move for summary judgment on four grounds. First, they claim that the Bergers' constitutional claims were already litigated in the criminal case and their action is barred by collateral estoppel. Second, they argue that as a matter of law, there is no constitutional, statutory, or common law liability for recording voluntary conversations with law enforcement officers or videotaping areas outside the family residence. Third, CNN and Hamann argue that the Bergers have failed to plead or otherwise satisfy the standards required under the First Amendment for the requested injunction. Finally, they contend that the Bergers cannot fulfill the requirements for their common law theories.

A. *Collateral Estoppel*

CNN and Hamann claim that the Berger's constitutional claims were already litigated in the criminal case and their action is barred by collateral estoppel. The plaintiffs, however, argue that the action is not barred because the issues in the two cases are different. Specifically, the Bergers assert that the Fourth Amendment was not previously adjudicated, that CNN's involvement was not considered, and that Mrs. Berger was not a party.

The Bergers' arguments are not persuasive. CNN and TBS shared the same role in the search; they were essentially one in the same. Consideration of CNN's involvement in the prior suit is essentially consideration of TBS's involvement. The same argument holds true for Mrs. Berger. She is in privity with Mr. Berger. She held the same position as Mr. Berger and went through the same experience. If his rights were not violated, her rights were not violated.

In the criminal case against Berger, the defendant sought to suppress evidence obtained in the search on the basis that his Fourth Amendment rights had been violated.

United States v. Paul W. Berger, CR 93-46-BLG-RWA (D.Mont. 1993). Berger argued that the search was illegal. Magistrate Judge Anderson held a full hearing on these issues. Because the search conducted at the ranch did not violate the Fourth Amendment, Magistrate Judge Richard W. Anderson denied the suppression motion. In the case at bar, the plaintiffs are again arguing that their Fourth Amendment rights were violated by the search.

Magistrate Judge Anderson's holding in the criminal case, however, bars a *Bivens* action in this case. *See Matthews v. Macanas*, 990 F.2d 467, 468 (9th Cir. 1993) (if a court in a criminal case holds that a search warrant is supported by probable cause and constitutional rights were not violated, a subsequent *Bivens* civil action is barred by collateral estoppel); *Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 762 (9th Cir. 1991) (plaintiff estopped from bringing a civil action because issue determined in criminal case), *cert. denied*, 502 U.S. 1091 (1992). A *Bivens* action authorizes a cause of action against persons, acting under color of federal law, for violations of constitutional rights. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Because the constitutionality of the search has already been litigated, the causes of action based on the constitutionality of the search are barred by collateral estoppel.[2]

The Bergers' Fourth Amendment claims against CNN and Hamann arising from the videotaping of various places on the ranch also fail because neither CNN nor Hamann were acting under color of law when they filmed the execution of the search. When a private party, such as CNN, is present during a search as a means of furthering its own interests, it is not acting under color of fed-

[2] The videotaping of an execution of a valid search and seizure warrant does not render an otherwise reasonable search and seizure unreasonable. *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980).

eral law and is not liable under *Bivens*. *United States v. Miller*, 688 F.2d 652, 657-58 (9th Cir. 1982); *United States v. Jennings*, 653 F.2d 107, 110 (4th Cir. 1981). In this case, CNN and Hamann were not acting under the color of federal law.[3]

B. *Federal wiretap statutes*

The Bergers claim that CNN and Hamann "intercepted" their communications with the federal officers in violation of the Wiretap Act. The defendants are entitled to summary judgment on the wiretap claims because the federal agents consented to the recording.

The Wiretap Act prohibits the intentional interception of certain communications, but expressly allows persons to intercept and record communications under certain other conditions. Section 2511(2)(d) of the Act provides in pertinent part that:

> [i]t shall not be unlawful . . . for a person not acting under color of law to intercept a[n] . . . oral . . . communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C. § 2511(2)(d) (1970 & Supp. 1995).

The statute specifically provides that it is not unlawful to intercept oral communication where one of the parties has given prior consent. In the case at bar, law enforcement consented to CNN recording the conversations. The

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[3] To establish a *Bivens* action, the Bergers must prove that the media defendants (1) acted under the color of federal law and (2) deprived them of constitutionally protected rights. Because this Court determined that one prong was not met, this Court need not analyze the second prong.

exception to this statute does not apply because this Court does not find that defendants made the recordings for the purpose of committing a crime or tortious act. Instead, the recordings were made for the purpose of producing a news story and for the defendants' commercial gain. Since the Act provides that there is no liability to a third party if one party to the conversation consents to the third party recording and since the exception does not apply, neither CNN nor Hamann violated the Wiretap Act. *See, e.g., Desnick v. American Broadcasting Co., Inc.*, 44 F.3d 1345, 1353 (7th Cir. 1995) (wiretap statutes allow one party to have conversation recorded unless his purpose is to commit a crime or tort); *United States v. Mullins*, 992 F.2d 1472, 1478 (9th Cir. 1993) (no violation of Fourth Amendment where one party consented to the monitoring of wire communications), *cert. denied* 114 S. Ct. 556 (1993).

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The Bergers seek an injunction preventing CNN and Hamann from broadcasting or selling all or part of the videotape and recordings gathered during the search. They make this request though the segment has already been broadcast several times and has not aired in more than a year.

The request is essentially a request for a prior restraint, which carries a "heavy presumption against its constitutional validity." *CBS, Inc. v. Davis*, 114 S. Ct. 912, 914 (1994) (citation omitted). The term "prior restraint" is used to describe "administrative and judicial orders issued in advance of the time that communications are to occur and forbidding that those communications occur." *Alexander v. United States*, 113 S. Ct. 2766, 2771 (1993) (citation omitted). While the prohibition against prior restraints is not absolute, the gagging of publication has been considered acceptable only in "exceptional cases." *CBS*, 114 S. Ct. at 914.

The plaintiffs have not shown that this case is an exceptional case that would justify the imposition of a prior restraint.

D. *Common law Claims*

The Bergers have pled several state law claims against CNN and Hamann, including conversion, trespass, and intentional infliction of emotional distress.[4]

1. *Conversion*

In their conversion count, the plaintiffs allege that CNN and Hamann intentionally and wrongfully entered the Berger Ranch and wrongfully seized and appropriated both statements and private images of the Bergers, their premises, and possessions. CNN and Hamann contend that the images and voices cannot be the subject of a conversion action.

The elements necessary for a conversion action in Montana include ownership of property, a right of possession, unauthorized dominion over that property by another, and damages that result. *Eatinger v. Johnson*, 887 P.2d 231, 234 (Mont. 1995). The Ninth Circuit has held that three criteria must be met before the law will recognize a property right. First, there must be an interest capable of precise definition. Second, that interest must be capable of exclusive possession or control. Finally, the putative owner must have established a legitimate claim to exclusivity. *Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 903 (9th Cir. 1992), *cert. denied* 113 S. Ct. 2927 (1993).

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[4] The amended complaint also pled a claim of trespass against AUSA McLean. The United States was later substituted as the sole defendant for the claim of trespass against AUSA McLean pursuant to the Federal Employees Liability Reform and Tort Compensation Act. The claim against the United States for trespass was recently dismissed without prejudice by this Court in its December 15, 1995 and December 20, 1995 Orders.

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Conversion requires the intentional exercise of dominion and control over a chattel. *Ault v. Hustler Magazine, Inc.*, 860 F.2d at 883. The Bergers assert that the twenty-two tapes containing the images and statements of the Bergers are tangible chattel giving rise to the conversion action. The plaintiffs' argument was rejected by the Ninth Circuit in *Ault*. The *Ault* Court held that the photographs were the property of the photographer, not of the person photographed. *Id.* While the tapes may be viewed as tangible chattel, it is the chattel of the defendants, not of the Bergers. Therefore, there was no conversion of Berger's chattels. *Id.*

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The Bergers also allege that CNN and Hamann trespassed when they entered the Berger ranch to observe the execution of the search warrant. Consent of the owner,

possessor, or another authorized to consent, however, is an absolute defense to trespass. *See Salisbury Livestock Co. v. Credit Union*, 793 P.2d 470, 475 (Wyo. 1990).

In this case, the federal government had temporary control and possession of the property while executing the search warrant. CNN had the permission of the federal government to be present during the execution of the search warrant.[5] The plaintiffs' amended complaint acknowledges that permission was given by the government. The letter from CNN to AUSA McLean dated March 11, 1993 was sent to confirm that permission. (Pl.'s Statement of Facts, Ex. A).

Furthermore, the media defendants did not invade the property interests protected by the tort of trespass. *See Desnick*, 44 F.3d at 1352. The execution of the warrant was not disrupted by the presence of the media. The media was present for the purpose of news coverage only. In this case, the recorded transcript from CNN submitted by the plaintiffs, along with their attorney's affidavit in response to this moton, does not reveal that the crew was asked to leave, even though Mr. Berger apparently acknowledged that his picture was being taken. (Lansing's Aff., Ex. 8 at tape 08 page 13). Furthermore, any argument that the Bergers did not know the crew was a news crew is not dispositive. "[C]onsent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent." *Desnick*, 44 F.3d at 1351.

This Court finds that neither CNN nor Hamann are liable under a cause of action for trespass.

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[5] This Court has already ruled in CV-95-46-BLG-JDS that the government agents have qualified immunity for their actions in allowing the media to accompany them. The media's reliance on that permission was not unreasonable.

3. *Intentional Infliction of Emotional Distress*

Finally, the Bergers allege a cause of action for intentional infliction of emotion distress. Montana allows a separate cause of action alleging intentional inflicton of emotonal distress. *Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411 (1995). This independent cause of action may arise if there was serious or severe emotional distress to the plaintiff which was a reasonably foreseeable consequence of the defendant's negligent or intentional act or omission. *Sacco*, 896 P.2d at 429. It is a question of law whether a plaintiff has introduced sufficient evidence to support a prima facie case for intentional infliction of emotional distress. *Sacco*, 896 P.2d at 427.

This Court has already found that CNN and Hamann did not trespass when they accompanied the government during the execution of the search warrant. They are also not liable for recording conversations during the search or for capturing videotaped images of plaintiffs. Furthermore, the defendants are not liable for broadcasting a truthful, newsworthy story. Since no tortious conduct took place, emotional distress was not a reasonably foreseeable consequence of their actions. The plaintiffs' intentional infliction of emotion distress claim fails.

E. *Declaratory Judgment*

The Bergers are asking for declaratory judgment declaring essentially that the defendants violated the Bergers' constitutional rights. The declaratory relief sought is redundant of the claims already addressed in this opinion.

Courts generally recognize two criteria for determining whether declaratory relief is appropriate: (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. *Eureka Fed. Sav. and Loan Ass'n v. American Cas. Co. of Reading, Pa.*, 873 F.2d 228, 231 (9th Cir. 1989) (citations

omitted). In light of this opinion, the declaratory judgment requested by the Bergers is not warranted.

Accordingly,

IT IS ORDERED:

1. The defendants' motion for summary judgment is granted.

2. The plaintiffs' motion to set a preliminary pretrial conference is denied as moot.

3. The Clerk of Court shall forthwith enter summary judgment in favor of the defendants and against the plaintiffs.

The Clerk of Court is directed to forthwith notify the parties of the making of this order.

DONE and DATED this 26th day of February, 1996.

/s/ Jack D. Shanstrom
United States District Judge

APPENDIX D

[Filed Feb. 25, 1998]

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 96-35251
DC No. CV-95-00046-JDS

PAUL W. BERGER and ERMA R. BERGER,
Plaintiffs-Appellants,

v.

RODNEY C. HANLON; JOEL SCRAFFORD; RICHARD C. BRANZELL; ROBERT PRIEKSAT; KRIS A. MCLEAN; TURNER BROADCASTING SYSTEM, INC., a Georgia corporation; ROBERT RAINEY; DONALD HOOPER; UNITED STATES OF AMERICA,
Defendants-Appellees,

No. 96-35266

DC No. CV-94-00046-JDS
(District of Montana)

PAUL W. BERGER and ERMA R. BERGER,
Plaintiffs-Appellants,

v.

JACK HAMANN; CABLE NEWS NETWORK, INC.,
a Georgia corporation,
Defendants-Appellees.

ORDER

Before: SCHROEDER and KLEINFELD, Circuit Judges, and BREWSTER*, District Judge.

The panel as constituted above has voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35.

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

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* Honorable Rudi M. Brewster, United States District Judge for the Southern District of California, sitting by designation.